FILE COPY

FILED
OCT 2 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 502

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

ROSA LEE ROOSTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOS. B. RAMEY,
Citizens First National Bank Bldg.,
Tyler, Texas,
Attorney for Petitioner.

GORDON C. REEVES,
Fort Wayne, Indiana,
Of Counsel.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-8711

INDEX

	Page
Caption	1
Opinions Below	1
Judgment Sought to be Reviewed	2
Jurisdiction	3
Questions Presented	4
Statement of the Case	5
Reasons for Granting Writ of Certiorari	12
Argument:	
Majority Decision Abridges Right of Trial Court to Direct Verdict	14
Majority Decision Places Undue Burden on Life Insurance Industry	27
Majority Decision in Conflict with Other Decisions	31
Conclusion	43
Appendix A	1a-3a
Appendix B	1b-19b
Appendix C	1c-3c
Appendix D	1d
Appendix E	1e

	Page
Appleman on Insurance Law and Practice, Vol. 12, Sec. 7271	27
Atlantic Life Ins. Co. v. Hoefer, 66 Fed. 2d 464	13, 38
Cardwell v. United States, 196 Fed. 2d 382	34
Clark v. National Life & Acc. Ins. Co. (By the Supreme Ct. of Tex.), 145 Tex. 575; 200 S. W. 2d 820	14, 36
Columbian Ins. Co. v. Lawrence, 27 U. S. 25; 2 Pet. 25; 7 L. Ed. 335	27
Consolidated Edison Company v. N.L.R.B., 305 U. S. 197, 83 L. Ed. 126	16
Dossett v. Franklin Life Ins. Co., 276 S. W. 1097	23
Franks v. Groendyke Transport, Inc. (10th Cir.), 229 Fed. 2d 731	15
Jefferson Standard Life Ins. Co. v. Stevenson, 70 Fed. 2d 72	23
John Hancock Life Ins. Co. v. Esparza (By the Texas Court of Civil Appeals for the Fourth District; Writ of Error refused by the Supreme Ct., N.R.E.), 286 S. W. 2d 695	14, 42
McDaniel v. United States, 196 Fed. 2d 29	31, 33, 34, 35, 36
McSweeney v. Prudential Ins. Co., 128 Fed. 2d 660	13, 40
New York Life Ins. Co. v. Strudel, 243 Fed. 2d 90	23
Pence v. United States, 316 U. S. 332, 81 L. Ed. 1510	14, 31, 33
Provident Life & Accident Ins. Co. v. Hawley, 123 Fed. 2d 479	13
Rhodes v. Metropolitan Life Ins. Co., 172 Fed. 2d 183	31, 37, 40

Page

State of Washington v. United States (9th Circuit), 214 Fed. 2d 33 (Certiorari denied, 348 U. S. 862) 16, 17

Stewart v. American Life Ins. Co., 89 Fed. 2d 743 13

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311; 72 L. Ed. 895 27

Texas & Pacific Ry. Co. v. Stewart, 228 U. S. 357, 57 L. Ed. 875 15

Texas Prudential Ins. Co. v. Dillard (By the Supreme Court of Texas), Tex. ; 307 S. W. 2d 242 14

Title 28, U.S.C.A., Par. 1254(1) 3

United States v. Stratton, 232 Fed. 2d 800 31, 33, 34, 35

Wright v. Grain Dealers Nat. Mut. Fire Ins. Co. (4th Circuit), 186 Fed. 2d 956 15

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

ROSA LEE ROOSTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Lincoln National Life Insurance Company, a corporation, your Petitioner, prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 30, 1959.

OPINIONS BELOW

This cause having been submitted to a jury, after the Petitioner had moved the Court to withdraw the case from the jury and to direct a verdict in favor of the Peti-

tioner on the ground that the evidence was so uncontroverted as to raise no jury issue, and the jury having failed to agree upon a verdict, the Petitioner, pursuant to Rule 50b of the Federal Rules of Civil Procedure, filed a motion that judgment be entered in its favor in accordance with its previous motion for a directed verdict. After having received briefs from both parties, and after having heard oral argument respecting said motion for judgment, the Trial Court concluded that such motion was well taken and ordered that judgment be entered in favor of the Petitioner. In announcing such decision, the Trial Judge made certain comments expressing his opinion concerning the cause, which constitute a part of the record herein (R. 759-761). Such opinion is reproduced herein as Appedix A.

The Majority Opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Vol. 269 Fed. 2d 171*, and same is attached hereto as Appendix B. The Dissenting Opinion of Chief Judge Hutcheson of said Court of Appeals is reported in *Vol. 269 Fed. 2d 180*, and same is attached hereto as Appendix C.

JUDGMENT SOUGHT TO BE REVIEWED

In accordance with the Majority Opinion of the Court of Appeals in this cause, judgment was entered on July 30, 1959, a copy of which is attached hereto as Appendix D, ordering that the judgment of the District Court be reversed and the cause be remanded to the District Court for another trial, "Hutcheson, Chief Judge, Dissenting." (R. 785.)

Thereafter, in due course, Petitioner filed in said Court of Appeals its Petition for Rehearing (R. 786) and brief in support thereof (R. 792). Thereupon, an order was entered by the Court of Appeals on September 4, 1959, wherein said Petition for Rehearing was denied, "Hutcheson, Chief Judge, Dissenting." (R. 832.) A copy of said order is attached hereto as Appendix E.

Pursuant to application of the Petitioner, an order was entered in the Court of Appeals on September 28, 1959 (R. 838), whereby it was decreed that issuance of mandate in said cause be stayed until final disposition of this cause by the Supreme Court of the United States, provided that within thirty days from date of said order the Clerk of the Supreme Court shall certify to the Clerk of the Court of Appeals that Petition for Certiorari and the record in this cause have been filed in the Supreme Court (R. 838).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of *Title 28, U. S. C. A., Par. 1254(1).*

QUESTIONS PRESENTED

I.

Whether the duty and authority of the Trial Court to instruct a verdict, in a case where the evidence is uncontroverted, should be nullified by decision of the Court of Appeals that a jury trial was proper, when the opinion of the Court of Appeals discloses that its conclusion was not based upon the existence of controverting evidence, but upon mere conjecture and supposition as to the mental processes of the jurors.

II.

Whether the mere fact that a medical doctor was a man of means and bore a good reputation was sufficient evidence to raise a jury issue in a suit upon his life insurance policy, as held by the Court of Appeals herein, when the evidence is undisputed that said doctor fraudulently concealed from the insurance company, prior to the issuance of the policy, the fact that he was then afflicted with a serious malady and that he had previously been examined for same by other doctors with whom he was in continuous consultation, all of which facts were established by the written declarations and communications of the insured doctor himself.

III.

Whether a life insurance company is entitled to rely upon the truthfulness of statements made by a medical doctor in his application for life insurance, when after his

death, six months later, it is discovered that he was afflicted with a serious malady for which he had been examined by other doctors on several occasions, and with whom he was in continuous written consultation about his condition up to the time of making such application, which facts were concealed from the insurance company in the doctor's application for insurance, and which facts were established without controversy by the doctor's own written declarations and letters which came to light after his death.

STATEMENT OF THE CASE

Jurisdiction herein is predicated upon diversity of citizenship of the parties.

This cause was instituted in the United States District Court for the Eastern District of Texas, Tyler Division, by the Respondent, Mrs. Rosa Lee Roosth, a resident of Tyler, Texas, who was the surviving wife of Dr. Harold Roosth, deceased, against the Petitioner, The Lincoln National Life Insurance Company, an Indiana corporation. By this action the Respondent, as beneficiary in a certain policy of insurance issued by the Petitioner on December 24, 1956, to Dr. Harold Roosth as the insured, sought to recover of the Petitioner the sum of $50,000.00 as the proceeds of said policy, together with statutory penalties and attorneys' fees. Petitioner defended said action on the ground that the insured knowingly made several false statements and misrepresentations of fact in his written application for such insurance, with intent to deceive the

Petitioner, which were material and were relied upon by Petitioner in issuing said policy; and on the further ground that inasmuch as Dr. Roosth was not in good health when said policy was issued and delivered, same was ineffective as a contractual obligation.

The insured, Dr. Roosth, died suddenly from a cerebral hemorrhage on February 7, 1957, within six weeks after the issuance of said policy of insurance. (Certificate of Death, Plaintiff's Exhibit No. 7.) The insurance company discovered for the first time, in the course of an investigation it conducted after Dr. Roosth's death, that previously to his application for insurance he had been examined and observed for hypertension by doctors of the Smithwick Clinic in Boston, Massachusetts (R. 712-713). The investigation further developed that Dr. Roosth had been under examination and observation for hypertension by the doctors in the Smithwick Clinic in Boston on three occasions, to-wit, November 15-18, 1950, November 21, 1951, and June 11, 1953. (R. 227; Defendant's Exhibit No. 34.)

In his application for the insurance herein sued for, duly signed by Dr. Roosth (Defendant's Exhibit No. 3, Part 2), he made no disclosure or reference whatever to the fact that he was afflicted with hypertension, nor that he had been examined and observed by the doctors in the Smithwick Clinic for such condition. In answer to direct questions propounded in the application, Dr. Roosth made no mention of the fact that he had been in the Smithwick Clinic for examination, observation and treatment. (Question 13; Defendant's Exhibit No. 3, Part 2.) Nor did he,

in answer to specific questions in the application (Question 14), divulge the names of Dr. Smithwick, Dr. Kinsey, or other doctors of the Smithwick Clinic who had examined him for hypertension on the occasions heretofore mentioned.

In answer to other inquiries in said application for insurance, Dr. Roosth denied that he then "had any disease or disorder" (Question 11). He further stated therein that the cause of the death of his mother was "Childbirth," which was a palpable falsehood. In giving his case history, upon his first visit to the Smithwick Clinic in Boston, Dr. Roosth stated that the cause of his mother's death was "Hypertension" (Defendant's Exhibit No. 18). Likewise, he told Dr. Horwitz, who took his case history in the Massachusetts Memorial Hospital in Boston on November 15, 1950, that the cause of the death of his mother was "Cerebral Vascular Accident" (Defendant's Exhibit No. 17). It is noteworthy that the death of Dr. Roosth himself, as heretofore stated, was incident to a cerebral vacular accident. The Death Certificate of the mother of Dr. Roosth recited that the cause of her death was "Heart Block and Chronic Nephritis" (Plaintiff's Exhibit No. 6). In any event, despite any apparent discrepancies, it is inescapable that the cause of the death of Dr. Roosth's mother was not "childbirth."

The concealment and misrepresentation perpetrated by Dr. Roosth in his application for insurance in the particulars above mentioned are established incontrovertibly by the written declarations and communications of Dr. Roosth

himself. The record contains an exchange of correspondence between Dr. Roosth and Dr. Dera Kinsey and Dr. Reginald H. Smithwick extending over a period of time from November 22, 1950, to January 24, 1957. (Defendant's Exhibits Nos. 20, 4, 30, 5, 32, 7, 33, 7A, 29 and 31.) These communications are unimpeached and establish without contradiction the salient facts that Dr. Roosth was examined, observed and treated by the doctors in the Smithwick Clinic in Boston for "hypertension" on three occasions, and that this exchange of correspondence between said doctors regarding the condition of Dr. Roosth was continued from time to time until two weeks before his death. This unimpeached documentary evidence, together with the hospital and clinic records of the Smithwick Clinic pertaining to Dr. Roosth's examination and observation, made by and under the direction of the insured himself (Defendant's Exhibits Nos. 17, 18 and 34), constituted irrefuted proof supporting Petitioner's contention that Dr. Roosth concealed and misrepresented material facts in his application for insurance.

In his application for the insurance policy involved in this litigation, Dr. Roosth stated, in answer to Question 14(c), that previously he had had a mild heart attack in September, 1948, and that as a result of which he was confined to his bed, at his home in Tyler, Texas, for a period of two months, but that he had had a satisfactory recovery. In consequence of this heart situation, the Petitioner advised Dr. Roosth that it would issue the policy of

insurance only upon an increased premium charge, which was beyond the normal rate (R. 108).

According to the testimony of all of the doctors who testified, the existence of a hypertensive condition in an individual who also has been the subject of a heart attack, greatly aggravates the situation and materially reduces the life expectancy of such individual. Without question this hazardous situation was well known to Dr. Roosth who, himself, was an experienced Doctor of Medicine and a specialist in the field of Internal Medicine, which comprises the treatment and care of persons afflicted with cardio-vascular disturbances, including both heart ailments and hypertension. (R. 537-538.)

Likewise, the evidence is without dispute that if the officials of the Petitioner insurance company who approved Dr. Roosth's application for insurance, had been advised of his hypertensive condition, the policy would not have been issued because of the increased risk thereby occasioned, in conjunction with his history of a heart attack. (R. 458, 468-470, 495, 499.) Furthermore, it is uncontroverted that in approving Dr. Roosth's application for insurance, the officials and agents of the insurance company had no knowledge whatever of the existence of Dr. Roosth's hypertensive condition, nor that he had ever been examined, observed, or treated for such condition by any doctors or in any clinic or hospital. (R. 429, 437, 438, 466, 498-499.)

At the conclusion of the evidence the Petition moved the Trial Court to withdraw the case from the jury and to

instruct the jury to return a verdict in its favor, for the reason that the evidence was so uncontroverted as to raise no jury issue, in that (1) Dr. Roosth knowingly and willfully made false statements in his application for the insurance policy sued upon with the intention of deceiving the Petitioner, which relied thereon and was induced thereby to issue such policy, and (2) at the time such policy was applied for and issued, Dr. Roosth was not in good health (except for the residual effects of a prior heart attack). (R. 18-21.) The Trial Judge declined to grant said motion for directed verdict when same was presented at the close of the evidence, but he submitted the cause to the jury subject to a later determination of the legal questions raised by said motion, as authorized by the provisions of Rule 50(b) of the Federal Rules of Civil Procedure. (R. 738.) After deliberating for an extended period of time, the jury was unable to agree upon a verdict and was discharged by the Court. (R. 757-758.)

As heretofore has been indicated, the Trial Court granted the motion of the Petitioner for judgment, filed in accordance with the provisions of Rule 50(b) of the Federal Rules of Civil Procedure (R. 31-33), and accordingly, judgment was entered in favor of the Petitioner that the Respondent recover nothing by this suit. (R. 31-33.)

An appeal from said judgment having been prosecuted by the Respondent to the Court of Appeals for the Fifth Circuit, and by divided Court of two to one—Chief Judge Hutcheson dissenting—the Court of Appeals ordered that

the judgment of the Trial Court be reversed and the cause be remanded for another trial. (R. 785.)

The opinion of the majority of the Court of Appeals is predicated upon the conclusion that the Trial Court erred in entering judgment in this cause absent jury findings; whereas, Chief Judge Hutcheson, in dissenting, expressed the view that the evidence disclosed no issue properly to be submitted to the jury. (Appendix A, Appendix B, and Appendix C.)

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

The decision of the majority of the Court of Appeals has abridged the authority vested in the Trial Court to direct a verdict when the evidence is so uncontroverted that reasonable minds cannot differ as to its effect; and in rendering such decision, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision of the Supreme Court.

II.

If it is permitted to remain unchallenged as a judicial precedent, the majority decision of the Court of Appeals places an undue burden upon the life insurance industry in that in consequence thereof the right of a life insurance company to rely upon the truthfulness of the representations made by the insured in the application for insurance is effectively nullified.

III.

The decision of the majority of the Court of Appeals is in direct conflict with other recent decisions of the same Court of Appeals for the Fifth Circuit, viz.:

United States v. Stratton, 232 Fed. 2d 880;

McDaniel v. United States, 196 Fed. 2d 291;

Rhodes v. Metropolitan Life Ins. Co., 172 Fed. 2d 183.

In consequence of the majority opinion in the instant cause, the principles of law announced by the same Court of Appeals in the cases above cited have been cast into a state of serious confusion and uncertainty, which is disparaging not only to the Bench and Bar, but also to litigants, present and future, whose rights may be concerned with similar legal situations.

IV.

The decision of the majority of the Court of Civil Appeals is in conflict with decisions of other United States Courts of Appeals involving the same legal issues, as follows:

McSweeney v. Prudential Ins. Co., 128 Fed. 2d 660, by the United States Court of Appeals for the Fourth Circuit;

Provident Life & Acc. Ins. Co. v. Hawley, 123 Fed. 2d 179, by the United States Court of Appeals for the Fourth Circuit;

Atlantic Life Ins. Co. v. Hoefer, 66 Fed. 2d 461, by the United States Court of Appeals for the Fourth Circuit;

Stewart v. American Life Ins. Co., 89 Fed. 2d 743, by the United States Court of Appeals for the Tenth Circuit.

V.

The decision of the majority of the Court of Appeals is in conflict with the decision of this Honorable Supreme Court in Pence v. United States, 316 U. S. 332, 81 L. Ed. 1510.

VI.

The decision of the majority of the Court of Appeals is in conflict with the applicable law of the State of Texas as is evidenced by the opinions in the following cases:

Clark v. National Life & Acc. Ins. Co. (By the Supreme Court of Texas), 145 Texas 575; 200 S. W. 2d 820;

Texas Prudential Ins. Co. v. Dillard (By the Supreme Court of Texas), Texas ; 307 S. W. 2d 242;

John Hancock Life Ins. Co. v. Esparza (By the Texas Court of Civil Appeals for the Fourth District; Writ of Error refused by the Supreme Court, N.R.E.), 286 S. W. 2d 695.

ARGUMENT

Majority Decision Abridges Right of Trial Court to Direct Verdict

We are well aware of the reluctance of this Honorable Supreme Court to entertain a review of a decision of a Court of Appeals when issues of fact may be involved. May we respectfully urge, however, that the review here sought involves more than a mere determination of the eixstence *vel non* of controverting fact issues necessitating a jury

trial. There is involved herein the fundamental question of an abridgement of the authority and duty of a Trial Court to direct a verdict whenever the evidence is of such conclusive nature as to leave no reasonable doubt as to what the true facts are.

It is the well-settled rule in the Federal Courts that if the Trial Court reaches the conclusion that the evidence is such that if a verdict returned in favor of one party would have to be set aside, the Court may and should direct a verdict for the other party. This principle was announced long ago by the Supreme Court of the United States in *Texas & Pacific Ry. Co. v. Stewart, 228 U. S. 357, 57 L. Ed. 875*, in the following language:

> "As a preliminary to the consideration of the first question it may be well to repeat what this court often has said, that when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party."

The foregoing pronouncement has been recognized and followed by the Federal Courts through the years. Among some of the decisions which reiterate this principle are the following: *Wright v. Grain Dealers Nat. Mut. Fire Ins. Co. (4th Circuit), 186 Fed. 2d 956;* and *Franks v. Groendyke Transport, Inc. (10th Circuit), 229 Fed. 2d 731.* In the opinion in the latter case, the Court said:

> "But it is the province and duty of the court to direct a verdict where the evidence is without dispute

> or is conflicting but of such conclusive nature that if a verdict were returned for one party the exercise of sound judicial discretion would require that it be set aside."

In *State of Washington v. United States (9th Circuit), 214 Fed. 2d 33 (Certiorari denied, 348 U. S. 862)*, the Court laid down the rule, which is therein recited to be the recognized rule, that "The crux of the matter is whether there is substantial evidence to support the verdict." In defining the term "substantial evidence" the Court refers to the definition that is found in the decision of the Supreme Court of the United States in *Consolidated Ed. Company v. N.L.R.B., 305 U. S. 197, 83 L. Ed.* as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

There is no need that we be reminded that the Trial Judge, from his vantage point, is in a better position to appraise and evaluate the evidence than anyone else. The fact that he hears the witnesses testify and observes their demeanor on the witness stand, enables him to have a better opportunity to determine whether or not the evidence is such that reasonable minds cannot differ as to its consequences. We sincerely entertain the view that under our system of jurisprudence the Trial Court is vested with a greater degree of discretion in making such determination. As is said in the opinion of the Court of Appeals for

the Ninth Circuit in *State of Washington v. United States*, supra:

> "However, in making the primary determination as to whether or not there is substantial evidence, a district judge is not a mere 'automaton.' He must determine not whether there is literally no evidence, but whether there is any upon which a judge can properly proceed to find a verdict for the party producing it.
>
> "* * *
>
> "The Federal rule is clear that when the evidence is so overwhelming on one side as to leave no doubt as to what the fact is, the trial court may and should direct a verdict or render judgment notwithstanding the verdict."

A consideration of the record in the instant case should be convincing that the Trial Judge acted in accordance with the foregoing principle of law. Assuredly, in view of the state of this record and the evaluation of the evidence which was made by the Trial Court, he would have been compelled to set aside a verdict in favor of the plaintiff in this cause, in the event such a verdict might have been rendered.

Apparently, with some misgiving, the Court submitted the cause to the jury, subject to the reservation of action on Petitioner's Motion for a Directed Verdict, which Motion was submitted at the conclusion of the evidence. (R. 738.) Subsequently, at the hearing on Petitioner's Motion for Judgment, the Trial Court frankly stated his definite convictions, to the following effect: (1) That Dr. Roosth "died believing he had hypertension and believed it long before he made application for this insurance policy"; (2) "there

are undoubtedly misrepresentations made on his part and made willfully and with knowledge that he was making them"; (3) "There is no question in my mind that those questions were material to the risk"; (4) "There is no question in my mind as a matter of law under the undisputed evidence in this case that the insurance company relied on them"; (5) "Now, if there ever was a case in which the intent to defraud was established as a matter of law, intent to deceive was established as a matter of law in my mind, this is such a case. To me, it is a most flagrant attempt to deceive the insurance company in this case. And couldn't have been done for any other purpose except with a deliberate and conscientious intent to deceive and cause them to write this insurance policy." (R. 760.) Upon the basis of these findings, the Trial Court granted Petitioner's Motion for Judgment. (Appendix A.)

Although the majority opinion is rather extensive in the discussion of the evidence in this cause, as the same relates to the various issues submitted on this appeal, we are compelled to call to the attention of the Court two very vital factual matters that apparently escaped the attention of the majority of the Court of Appeals. No comment whatever is contained in the majority opinion relative to either of such items. Inasmuch as each of such items is vital and controlling in the proper disposition of this appeal, and inasmuch as the factual situations referred to are established without any semblance of controversy, we request a careful consideration of the same.

The first of such items has its basis in the negative answer which Dr. Roosth made to Question 14(i) in the application for insurance. In answering such question, which inquired the names of any physician or practitioner he had consulted within the preceding five years, Dr. Roosth wholly failed to state that he had consulted Dr. Dera Kinsey and Dr. Reginald H. Smithwick of the Smithwick Foundation Clinic in Boston. The evidence is undisputed that Dr. Roosth consulted, and was examined by, Dr. Kinsey in November, 1951, and in June, 1953, for and because of his hypertension, in the Smithwick Foundation Clinic in Boston, and that both of such occasions were within five years prior to November 11, 1956, the date upon which such application for insurance was signed by Dr. Roosth. The evidence is also uncontroverted that during said five-year period he consulted both Dr. Kinsey and Dr. Smithwick by correspondence with them regarding his hypertensive condition and the treatment therefor.

In discussing the answer of Dr. Roosth to Question 14(i), the majority opinion makes reference only to the fact that during said five-year period Dr. Roosth had consulted Dr. Young and Dr. Ruskin, and the conclusion of the majority with respect to the answer to such question is founded on the fact that the consultation with such doctors related only to Dr. Roosth's heart condition, concerning which the insurance company was advised in the application for insurance. Manifestly, in dealing with the false answer to Question 14(i), the majority inadvertently gave no attention to the fact that Dr. Roosth had failed and refused to

mention his consultations, observations, and examinations with and by Dr. Kinsey and Dr. Smithwick, or either of them.

In Question 13 of Dr. Roosth's application for insurance herein, he was explicitly asked whether or not he had "ever been in a hospital, *clinic*, sanitorium or institution for *observation*, treatment or operation." (Italics ours.) In answering said question it appears unequivocally that Dr. Roosth failed to mention the Smithwick Foundation Clinic, or if you prefer, the clinic of the Medical Associates Group. Likewise, this factual item, which also is without contradiction, apparently escaped the attention of the majority of the Court of Appeals because no reference whatever to same is found in the majority opinion.

Here we have another instance of an express falsification or misrepresentation by Dr. Roosth of a material matter. Here again we find an instance where Dr. Roosth deliberately failed to reveal in his application for insurance that he had been examined at least on two occasions within the preceding five years by Dr. Kinsey of the Smithwick Foundation Clinic for the express purpose of observing his hypertensive condition. Two letters written by Dr. Roosth to Dr. Kinsey in November 1951 and May 1953 (Defendant's Exhibits No. 5 and No. 6) established beyond question the fact that Dr. Harold Roosth made engagements for examination by Dr. Kinsey concerning his hypertensive condition. It matters not that on each of said occasions Dr. Roosth accompanied his brother, Bennie Roosth, to Boston in order that he, too, might undergo examinations. The

fact remains that at such time he, Dr. Roosth, arranged for his personal examination and observation concerning "my hypertension."

As above discussed, in Question 13 of the application for insurance herein involved, Dr. Roosth was asked if he had "ever been in a *hospital* * * * for *observation*, treatment or operation?" Immediately following said inquiry is the following direction: "If so, give date and details. Names of Institutions. Address of Institutions. Names of Physicians or Surgeons." In answering said question Dr. Roosth made mention only of Medical Center Hospital and Mother Frances Hospital; both of which are hospitals located in his home city, Tyler, Texas. It is strikingly significant that he made no mention whatever of the fact that he had been confined in the Massachusetts Memorial Hospital for examination and observation on account of hypertension for a period of some three days from November 15 to November 18, 1950. Not only did he fail to make mention of such hospital in answer to said Question 13, but he also failed (as he was instructed to do) to give the names of physicians or surgeons who attended him while he was in such hospital. The record also shows without dispute that he was attended in said hospital by Dr. Dera Kinsey, and various other doctors, who conducted numerous tests for the purpose of determining the nature and extent of his hypertensive condition.

In the opinion of the majority of the Court of Appeals there is emphasized the fact that Petitioner, in passing upon Dr. Roosth's application for insurance, was in pos-

session of a letter written by Dr. Arthur Ruskin to Dr. Ghent Graves, Medical Director of another life insurance company, concerning the condition of Dr. Roosth in which there is a statement that "report from Massachusetts Memorial Hospital in June, 1943, noted essentially the same findings." A reading of said letter discloses unequivocally that the same has reference only to Dr. Roosth's heart condition, and the same makes no mention whatever of Dr. Roosth's hypertension. The entire purport and tenor of the Ruskin letter was to give a report concerning the then present status of Dr. Roosth relative to his heart condition. Nothing whatever is contained in said letter that would put the Petitioner, or any other reasonable person, on notice that Dr. Roosth was admitted to Massachusetts Memorial Hospital in November, 1950, "with chief complaint of hypertension," as the admission records of said hospital undeniably disclose.

We urgently insist that under the well settled rule of law the contents of the Ruskin letter were in nowise sufficient to raise a suspicion that Dr. Roosth had undergone examination and observation in Massachusetts Memorial Hospital on account of hypertension. The rule of law is well settled that a life insurance company is not estopped to rely on the false representations by the assured relative to prior medical or hospital attention as a result of information indicating otherwise, if such information within itself does not reflect the absolute falsity of the assured's representations. This rule have been recognized and reaffirmed by the Court of Appeals for the Fifth Circuit in

many decisions, among which are the following: *Jefferson Standard Life Insurance Co. v. Stevenson, 70 Fed. 2d 72,* and the more recent opinion in *New York Life Ins. Co. v. Strudel, 243 Fed. 2d 90.* This doctrine is in accord with the recognized rule in Texas as is reflected by the opinion of the Commission of Appeals adopted by the Supreme Court of Texas, in *Dossett v. Franklin Life Ins. Co., 276 S. W. 1097.*

Applying this rule to the facts in the instant case, it follows that inasmuch as the insurance company was already apprised of Dr. Roosth's heart condition, and inasmuch as the Ruskin letter purported to relate only to such condition, said letter created not the slightest suspicion in the minds of the representatives of the insurance company that Dr. Roosth also had undergone examinations and observations for hypertension. Surely it is untenable to contend that a heart condition and hypertension are one and the same ailment or disease, and that if one is afflicted with heart disease, necessarily he is also afflicted with hypertension. There is no testimony to such effect in this record, and no one contends that such is a medical fact. Indeed, it is well established that a person may have been subjected to a heart condition and have no semblance of hypertension whatever. It is the combination of the two that creates a most serious situation; and that is why the Petitioner has taken the position in this case that under the existing circumstances Dr. Roosth, who of all persons was well aware of the hazards involved, was duty bound to make truthful disclosures of his condition and experience in his application for insurance.

The majority of the Court of Appeals does not undertake to refute by factual reference to the record in this cause the evidence which we have hereinbefore discussed, and upon the basis of which the Trial Court entered judgment for the Petitioner. The most that can be gleaned from a reading of the majority opinion that can be construed to negative such conclusion are certain tenuous and unsubstantial statements which find no foundation whatever in the evidence in this cause and which constitute no answer to the position taken by the Trial Court. For instance, in undertaking to defend Dr. Roosth's failure to mention in his application for insurance the fact that he had been in the Smithwick Clinic and the Massachusetts Memorial Hospital, the majority opinion recalls that Dr. Roosth did state that he had been in two hospitals located in Tyler, Texas, but "he did not answer that he had never been in any other institution." (Opinion, p. 7.) Frankly, we cannot comprehend that a court of justice could condone such an evasion of the truth in such a manner. Here Dr. Roosth was called upon to name *all* of the hospitals and clinics in which he had been treated or observed, and the fact that he mentioned two hospitals in his home town, but failed to mention a hospital and a clinic in Boston, Massachusetts, constituted a mis-statement of the facts, nevertheless. A half truth is still an untruth.

As a further excuse for the failure of Dr. Roosth to mention in his application for insurance that he had been in Massachusetts Memorial Hospital, the majority opinion

recites that "The evidence shows that insured was not admitted to said institution as a patient or for treatment." (Opinion, p. 7.) Although the undisputed record shows that Dr. Roosth remained in Massachusetts Memorial Hospital for a period of three days from November 15 to 18, 1950; the statement that he was not admitted as a patient is beside the point. Question 13 in the application for insurance signed by Dr. Roosth inquires whether or not the applicant "ever has been in a hospital, * * * for observation, treatment or operation." (Defendant's Exhibit No. 3.) The salient fact is that Dr. Roosth himself underwent a three-day confinement in Massachusetts Memorial Hospital for observation in connection with "his chief complaint of hypertension," as reflected by the case history taken by Dr. Horwitz upon Dr. Roosth's admission to the hospital. (Defendant's Exhibit No. 17.)

Finally, in a rather desperate gesture to justify its position that in spite of the uncontroverted evidence, this cause should have been submitted to the jury, the majority opinion concludes with the argument that inasmuch as Dr. Roosth "was a prominent and outstanding citizen in his community," and that "* * * he was a man of means," such facts negatived the fraudulent acts that he prepetrated upon the Petitioner. Apparently epitomizing the basic reason why it was concluded by the majority of the Court of Appeals in the case at bar that a jury should be permitted to render a verdict in this case, is the following very re-

markable statement which is found in the concluding paragraph in the opinion of the majority:

> "It is a rare case which would justify a finding that, as a matter of law, a man of character has stooped to the cheap fraud relied upon here. We think that it was error for the Judge so to decide. The case, in all of its aspects, should be decided by a jury." (Opinion, p. 19.)

Thus, we are inevitably driven to the opinion that irrespective of applicable legal principles and rules of procedure, the majority of the Court of Appeals has decided that a man accused of fraudulent acts may be acquitted of the consequences of same by proof of his wealth and prominence. The natural inference to be drawn from such a statement as is found in the majority opinion is that as a matter of law when a man becomes a millionaire, and a prominent citizen, he then becomes beyond reproach. Since when, may we ask, has it come to be recognized as a legal principle that a man's integrity is measured by his wealth and social prominence? We respectfully submit to this Honorable Supreme Court that it is unthinkable that such reasoning as the majority of the Court of Appeals has employed in this instance should be permitted to remain unchallenged.

The only plausible explanation that can be given for the conclusion reached by the majority herein is that the majority concluded that under no circumstance or condition should an action of this nature be withdrawn from consideration of the jury. Such conclusion, of course, is out of harmony with long-established and well-recognized legal procedures.

Majority Decision Places Undue Burden on Life Insurance Industry

The insured, by consenting to undertake a risk, does so under an implied condition that it shall be equally informed with the insured as to all material circumstanees so that it may judge the nature and etxent of the risk for itself. *Appleman on Insurance Law and Practice, Vol. 12, Section 7271.* Fair dealing between the insured and the insurer was prescribed as the requisite rule of conduct in an early decision of the Supreme Court in which the opinion was written by the eminent Chief Justice Marshall in *Columbian Ins. Co. v. Lawrence, 27 U. S. 25; 2 Pet. 25; 7 L. Ed. 335.* In said opinion Chief Justice Marshall stated:

> "Fair dealing requires that he (the insured) should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract."

The same rule was reiterated in a more recent opinion of the Supreme Court written by Justice Stone in *Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311; 72 L. Ed. 895,* in the following language:

> "Insurance policies are unconditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. • • •.
>
> "For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him."

There can be no question that a revelation in the application that Dr. Roosth had consulted the doctors of the Smithwick Foundation Clinic in Boston would have been most significant. The testimony of Appellee's Chief Medical Director, Dr. Scoins, that the Smithwick Foundation Clinic bears an outstanding reputation for treatment and surgical operations for hypertension, is unchallenged. Dr. Scoins stated, therefore, that if he had known that Dr. Roosth had been examined by the doctors of the Smithwick Foundation, or that he had been to the Smithwick Clinic, such information would have been most significant in passing upon Dr. Roosth's application, and that most certainly the Petitioner would have made inquiry of the Smithwick Clinic for a clinical report and findings concerning Dr. Roosth before approving his application for insurance. (R., pp. 502, 503, 506.)

Grant, for the sake of argument only, that Dr. Roosth was not afflicted with hypertension as a disease, or even with so-called essential hypertension. Grant further, for the sake of argument, that Dr. Roosth was subject only to intermittent periods of high blood pressure. Nevertheless, the facts remain undisputed that Dr. Roosth was examined by doctors in Boston with "chief complaint of hypertension," and that he had three of such examinations over a period of four years by doctors of the Smithwick Foundation Clinic, and that he continued to consult with such doctors concerning "his hypertension" until after he made the application for insurance involved herein. That these examinations and consultations took place, the Petitioner insurance company

was entitled to know in answer to Questions 14(h) and 14(i) in its application, in order that the Petitioner might be able properly to consider and evaluate Dr. Roosth's application for insurance. Irrespective of whether or not Dr. Roosth actually was afflicted with hypertension, or merely an occasional period of high blood pressure, the insurance company was entitled to know the facts concerning consultations with doctors, for the purpose of ascertaining whether or not he was afflicted with hypertension, so that the insurance company could then reach a decision whether or not under all the circumstances it desired to approve the application.

Moreover, the evidence leaves no doubt that the Petitioner would not have approved Dr. Roosth's application for insurance if it had been advised that he was afflicted with hypertension. The reason, as stated by Dr. Scoins, Chief Medical Director of the insurance company, is that hypertension materially decreases the life expectancy of one who has had a heart attack. (R., pp. 498-499; 512-513.) Appellee's Manual of Instructions to Medical Examiners, relating to disregarding history of high blood pressure, referred to on page 8 of the majority opinion, palpably has no significance here. Such instructions relate to high blood pressure alone, and not to high blood pressure superimposed upon a history of a heart attack. It is the combination of the two elements, heart condition and hypertension, that gives rise to uninsurability.

To be sure, as is stated on pages 14 and 15 of the majority opinion, it will be conceded that Dr. Roosth as a coro-

nary patient remained heart conscious. By the same token, being well informed of the additional hazard of the hypertension with which he was burdened, there existed all the more reason for Dr. Roosth to be apprehensive of his condition and his future. Therefore; considering his answers to the questions in the application for insurance, from the viewpoint of what he had in mind when he gave them, it is inevitable that he knew that a revelation of his hypertensive condition, when considered in connection with his heart history, would defeat his purpose to obtain life insurance.

There is at issue in this Petition for Writ of Certiorari the maintenance of the basic principle that an insurance company is entitled to rely upon the statements and representations in applications for life insurance, especially in cases where the application is made by one who is exceptionally qualified to possess full knowledge of the nature and truthfulness of such statements and where the falsity thereof is unequivocally established by his own unimpeached and documented declarations. The life insurance industry has become one of the most important businesses in our economy, as well as in our social structure. Indeed, the continuation of the welfare of this nation, to a significant degree, depends upon a proper concept of the relations between insurer and insured.

If the time has arrived, as is indicated by the majority opinion of the Court of Appeals in this cause, when a life insurance company can no longer expect to be protected in our tribunals against deliberate falsifications in applications for insurance, then a complete revision of the life

insurance processes will become inevitable. If trial courts are denied the authority to direct verdicts in favor of life insurance companies in suits upon policies that have been procured through fraudulent misrepresentations by the insured, then applications for insurance will become but meaningless and useless words upon mere scraps of paper. The ultimate consequences of such a drastic revision in insurance procedures will be most costly, not only to life insurance companies, but also to the millions of people who may desire to procure life insurance. Undoubtedly the additional cost of procuring life insurance under such conditions will be monumental, and necessarily the burden of such additional cost must be borne by the public who purchases the insurance.

Majority Decision in Conflict with Other Decisions

As is indicated in the dissenting opinion herein of Chief Judge Hutcheson of the Court of Appeals for the Fifth Circuit, the decision of the majority is clearly out of harmony with the decision of the Supreme Court of the United States in *Pence v. United States, 316 U. S. 332, 81 L. Ed. 1510.* Moreover, as is further indicated in Judge Hutcheson's dissenting opinion, the decision of the majority is contrary to other decisions of the same Court of Appeals for the Fifth Circuit in *United States v. Stratton, 232 Fed. 2d 800*, and in *McDaniel v. United States, 196 Fed. 2d 29*, and in *Rhodes v. Metropolitan Life Ins. Co., 172 Fed. 2d 183.*

In the *Pence* case, the wife of a deceased doctor who had been in the service of the United States Government,

sought to recover the proceeds of a government life insurance policy. The Government defended on the ground that said policy, which once had lapsed, had been reinstated on the strength of fraudulent representations made by the insured that he had not been treated for certain diseases and had not consulted physicians in regard to his health. A directed verdict for the Government was sustained by the Supreme Court on the ground of such representations, in view of the introduction of certain documentary evidence signed by the insured which revealed the falsity of the statements he had made in his application for reinstatement, even though there was evidence to the effect that the insured was in apparent good health at the time of the reinstatement and further, that his wife testified that she had no knowledge of the facts which established the misrepresentations. The fact that the insured himself was a doctor, and thus, was well acquainted with the importance and effect of the statements contained in the application for reinstatement, was significant in the conclusion of the Court that such statements were made with intent to deceive, as a matter of law. We quote from the language of Justice Jackson in the Court's opinion, as follows:

> "Pence's representations in the application were not evidence of their own veracity. His later contrary statements were repeated, and usually under oath; they are in no way improbable, and are the statements of one who, being himself a doctor, spoke with knowledge of the subject and bearing of his statements. His admissions left no room for conjecture as to the falsity of the previous statements in the application, and of his knowledge of such falsity. * * *."

Two rather recent decisions of the Court of Appeals for the Fifth Circuit have applied and expressly followed the principle of law announced by the Supreme Court in the *Pence* case. Reference is made to *McDaniel v. United States*, and *United States v. Stratton*, supra.

In both of said cases the Government defended suits by beneficiaries to recover the proceeds of national life insurance policies on the ground that in the applications for reinstatement of such policies the insured made misrepresentations of fact concerning his good health at that time and concealed his consultation with doctors since the lapse of the policy. Conceding that such answers of the insured did not fully and correctly state the true facts, the claimants sought to recover on the ground that such misrepresentations were not wilfully and fraudulently made with intent to deceive. In each case the Court of Appeals for the Fifth Circuit denied recovery on the policy. Sustaining the position of the Government in the *McDaniel* case, the following language is found in the opinion of Judge Hutcheson:

> "In agreement throughout with the positions taken by appellee, we think it entirely clear that no amount of casuistry short of that which would make black seem white, the false true, can explain away or justify the false answers the insured deliberately gave twice in almost a few months."

In the *Stratton* case, the cause was tried to a jury and defendant's motion for a directed verdict having been denied, there was a verdict and judgment for the plaintiff. On appeal the United States insisted that the evidence

established, as a matter of law, that the answers of the insured in his application for reinstatement of the policy, that (1) he was then in as good health as on the date the defaulted premiums became due, and (2) that he had not been ill or consulted a physician since such default, were known by him to be untrue and were fraudulently made to deceive. The evidence showed that the insured was an intelligent manager and salesman for a wholesale grocery firm, and that on the day before he tendered the overdue premiums he had a loss of consciousness, which required his hospitalization. No definite diagnosis of the cause of the unconsciousness was made, but the insured died about one month thereafter from a brain tumor, which was disclosed by an autopsy. Following the holding in the *Pence* case and the *McDaniel* case, the Court of Appeals reversed the judgment of the trial court and rendered same in favor of the appellant.

In the *Stratton* case, as well as in the *McDaniel* case, the claimants relied upon another decision also rendered by the Court of Appeals for the Fifth Circuit, *Cardwell v. United States, 196 Fed. 2d 382*, which is also cited by Appellant in her brief herein. In this case it was held that the issue of fraudulent intent was one of fact that should have been submitted to the jury for determination. Distinguishing the *Cardwell* case, Judge Hutcheson called attention in both the *McDaniel* case and the *Stratton* case to the fact that in the *Cardwell* case the insured was a carpenter who "not only did not know that he had a serious disease, but on the contrary had been advised by his physician that his trouble

was imaginary and that there was nothing physically wrong with him"; whereas, in the *McDaniel* case the decedent was a lawyer and a college graduate, and in the *Stratton* case the decedent was a responsible business man, and each of them knew that he was seriously afflicted with a physical disease or disability, albeit each one may not have known the exact nature thereof. In consequence thereof, the conclusion of the Court in the *Stratton* case and in the *McDaniel* case is epitomized by the following language of Judge Hutcheson in the opinion in the *Stratton* case:

> "We think the facts in this case, including what was physically happening to the deceased at the very time that he was seeking by statements, which he knew to be false, to obtain a reinstatement of his policy, are of such force as to compel the conclusion that no honest person could reasonably have given the false answers he gave without intending to defraud, and that no jury could have reasonably found that he did not so intend."

It is urgently submitted that the undisputed facts in the case at bar bring it within the purview of the decisions in the *McDaniel* case and the *Stratton* case, and likewise distinguish it from the holding in the *Cardwell* case. Here, as in the *McDaniel* case and in the *Stratton* case, the insured was a man of intelligence, splendid education, excellent training, and a specialist of the specific field of medicine in which the disease with which he was afflicted was concerned. Consequently, he, of all persons in the world, was in the position to know that he was afflicted with hypertension, that it was an incurable disease, and that the prospect of his life expectancy was very limited, in view of his hypertension superimposed upon his heart condition.

He repeatedly admitted, in his own words, over a period of seven or eight years prior to his death, that he was afflicted with hypertension, and to his dying day he never denied it. Therefore, we earnestly hold to the opinion, as did the trial court, that Dr. Roosth believed and knew, when he applied for the insurance involved in this litigation, that he was afflicted with hypertension, and he concealed the fact for the purpose of deceiving the Petitioner and inducing it to write the policy of insurance herein sued upon.

The issues required to be proven in order to establish the defense of false representations in applications for life insurance policies, in cases in the Federal Court dealing with National Service Life Insurance, are the same as those which are prescribed by the Texas courts in dealing with ordinary life insurance cases. In fact, in the *McDaniel* case, there are laid down the five identical elements which are prescribed by the Supreme Court of Texas to be proven in order to establish the defense of misrepresentation in applications for insurance policies, namely: (1) A false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) and with intent to deceive; (5) with action taken in reliance upon the representation.

The leading case rendered by the Supreme Court of Texas which announces the foregoing requisites is *Clark v. National Life Ins. Co.*, 145 Tex. 575, 200 S. W. 2d 820. However, in no event can the conclusion be drawn from the opinion in that case that each, or all, of said elements are necessarily questions of fact under Texas law. Indeed, in

connection with the discussion of these elements, the opinion in the *Clark* case contains the following express pronouncement:

> "Uncontroverted questions of fact need not be and should not be submitted to the jury for its determination; but they are proper subjects for peremptory instruction by the court."

In *Rhodes v. Metropolitan Life Insurance Company*, 172 *Fed. 2d 183*, the Court of Appeals for the Fifth Circuit had under consideration false reresentations in an application for a life policy, that the insured had no disease of the kidneys, that he had never had diabetes, and had not consulted a physician within the previous five years, as grounds for denial of liability under the policy. On the question of the materiality of such false representations this Court, in an opinion by Judge Lee, made the following comments, which we submit are very pertinent to the case at hand:

> "* * * Assuming that the insured was not guilty of fraud but was acting in good faith, the decisive question is whether the representations were material to the risk. We think, as a matter of law, they were. It cannot reasonably be supposed that the insurance company would have issued the policy if it had been informed of Dr. Hirsch's examinations, the tests he made, his diagnosis, and the treatment he prescribed and Dampf followed. Where all the testimony relating to a question of fact excludes every reasonable inference but one, the issue becomes one of law for determination by the Court. Lee v. All States Life Ins. Co., 49 Ca. App. 718, 176 S. W. 811, 813. The insured was shown to be a man of affairs, with fairly large business interests, and must have known that the purpose behind questions concerning his health and habits was

to enable the defendant to determine whether it would issue the policy. The statement of the court in First Trust Co. of St. Paul v. Kansas City Life Ins. Co., 8 Cir., 79 F. 2d 48, at page 54, is apposite: "* * * He could not have regarded a diabetic ailment as so trivial that an insurer would not want to know about it. The only possible rational explanation of his conduct is that he willfully made the false statements for the purpose of concealing the facts and of deceiving the insurer so that he might procure a policy which, if this truth were known, might be refused. In this situation of fact the only question is one of law and that is easy of solution. * * *."

Because of its particular similarity to the facts in the instant case, and its pronouncement of the relative law on the issue of materiality of false representations in an application for insurance, we make special reference to the decision of the Court of Appeals for the Fourth Circuit in *Atlantic Life Insurance Company v. Hoefer, 66 Fed. 2d 464*. The facts in this case disclose that the insured stated in his application that he was then in good health, that he had had a tonsillectomy, but that otherwise he had not consulted or been treated by a physician during the past ten years, and that he had had no other ailment or illness. The truth was that approximately three years previously he had had his blood pressure examined and same was found to be above normal. Thereafter, for a period of three years, his blood pressure was taken at regular intervals, and same being high and being accompanied by headaches and neuralgia, upon the advice of his physician, he was placed on a diet and submitted to the removal of his tonsils and also infected teeth. Thereafter his blood pressure became reduced for a time, but subsequently it fluctuated

between normal and abnormal ranges during a period of three years. After three years he died of a cerebral hemorrhage, shortly after the policy of insurance in question was written. We quote the conclusions of the Court relative to the materiality of the misrepresentations involved in the case cited as follows:

> "If this medical history of the insured had a material bearing upon the risk involved, the failure to communicate it to the insurance company prevented recovery in this case; for it is not a sufficient excuse that the insured believed that he had been cured when his blood pressure came down after the removal of his tonsils and some of his teeth. It was for the company and not for him to decide upon what terms, if at all, it was willing to insure his life. The medical testimony in the case shows quite conclusively that a blood pressure of 160 is abnormally high for a person of the age of the insured, and the maintenance of such a pressure for a substantial period of time is likely to be followed by a permanent hardening of the blood vessels, a condition of much significance in estimating the chances of longevity. Medical directors of several life insurance companies testified without contradiction that a well-regulated insurance company would have either refused the risk involved or have demanded further tests, or have required a higher premium, if the true facts had been communicated to it, and that this action would have been in accordance with underwriting rules and practices commonly employed by life insurance companies.
>
> "It follows that the facts omitted by the insured from his answers to questions propounded to him in the application had a material bearing upon his general health, and upon the risk which the company was requested to undertake; and the great importance of these inquiries is all the more clearly seen from the death of the insured from cerebral hemorrhage shortly after the policy was issued. * * *."

The element of the materiality of misrepresentations is not dependent upon a showing that the facts misrepresented had a direct relation to the cause of death. The recognized principle of law on this issue is found in the pronouncement of Judge Lee in *Rhodes v. Metropolitan Life Ins. Co.*, supra, as follows:

> "The argument that the misrepresentation was immaterial because the insured died from coronary thrombosis and not from diabetes, we think begs the question. The real issue has to do with the circumstances under which the defendant assumed the risk, whether it would have assumed the risk it did assume had the truth with respect to Dampf's health been made known to it. The cause of insured's death is not important, because the insurer would have had the right to cancel the policy if insured were still living."

There are numerous other decisions by the United States Courts of Appeals which might be cited in further support of the foregoing proposition. In the interest of time and space we shall pretermit any such further citations save and except one. We refer to the decision of the Court of Appeals for the Fourth Circuit in *McSweeney v. Prudential Insurance Company, 128 Fed. 2d 660 (Certiorari denied)*. This case arose in South Carolina, where, as in Texas, the law requires not only that the falsity of representations in the application for insurance, but also the intent to defraud, must be established in order to defeat recovery. The facts in the case cited are strikingly similar to those in the case at bar. Here the insured made false answers relative to his blood pressure and to previous consultations with physicians, in his application for insurance. In overruling the contention of the plaintiff that the decisions of

the South Carolina courts, to the effect that the issue of fraudulent intent was for the jury, the opinion in this case, which was written by that eminent jurist, Chief Justice John J. Parker, contains the following comment:

"* * * While the cases relied on are authority for the position that a fraudulent intent in addition to the false representations there shown is necessary to establish fraud, they are not authority for the position that fraudulent intent is not to be inferred from the making of false representations which are false within the knowledge of the person making them and are material and made to be acted on; and they do not militate against the holding of the Johnson case to the effect that fraudulent intent must be inferred from such representations when no other conclusion can reasonably be drawn from them. * * *.

"Applicant is shown by the evidence to have been a man of intelligence and the publisher of three rural newspapers. He must have known the significance of the numbness in his left side and the thickness of tongue which accompanied it. He consulted a specialist, and was told that he had abnormally high blood pressure, and took the matter so seriously that he took off weight too rapidly as a result of following the diet prescribed for him. Nevertheless he entirely failed to disclose these serious matters in response to the questions in the application making specific inquiry with regard to them, although he did mention treatment by a different doctor for a minor ailment. He was uninsurable and must have known that he was uninsurable; and if he had truly disclosed the facts as to which specific inquiry was made, he would never have obtained the policy. He obtained it by false answers, known to him to be false, which concealed his true condition. As said in the Johnson case, 'the undisputed facts can reasonably give rise to only one inference, namely that the policy was procured by fraud'."

The legal doctrine announced by the foregoing authorities is well recognized and followed by the courts of Texas. The statement is substantiated by the recent decision in *John Hancock Mutual Life Ins. Co. v. Esparza, 286 S. W. 2d 695*, decided by the Court of Civil Appeals at San Antonio in 1956 (Writ of Error refused, N. R. E.). This was an action brought by the insurance company to cancel a reinstated life policy after the death of the insured on the ground that statements made by the insured in the application for reinstatement, that insured was then in sound health and had not consulted or been treated by a physician, were false. The jury found that the insured did not intend by his false statements to induce the reinstatement of the policy, and judgment was rendered for the claimant. However, the appellate court held that inasmuch as such false statements were not ignorantly or innocently made, but that the insured then knew that he was suffering from a malady and was receiving medical treatments, the same negatives the jury finding that he did not intend to deceive. Thereupon the Court of Civil Appeals concluded as follows:

> "The motion for judgment non obstante veredicto should have been granted. We conclude, in any event, the finding that there was no intent to deceive is against the overwhelming preponderance of the evidence. The judgment is reversed and rendered canceling the policy."

The authorities hereinbefore cited clearly demonstrate that the opinion of the majority of the Court of Appeals for the Fifth Circuit in the instant case is completely out of harmony with the holdings in many decisions which are

considered authoritative. Not only is the majority opinion of the Court of Appeals contrary to the rulings, in cases with similar factual situations, of other United States Courts of Appeals, but the same, likewise, is contrary to the pronouncement of the law and decisions of the Supreme Court itself.

Equally as strange is the very evident fact that the decision of the majority is in strict disagreement with other decisions recently rendered by the same Court of Appeals. This situation is expressly adverted to in the dissenting opinion of Judge Hutcheson. Nevertheless, the majority opinion made no reference whatever to the *Stratton* case, the *McDaniel* case, or to the *Rhodes* case. Therefore, it cannot be considered that it was the purport of the author of the majority opinion, nor of his concurring associate, to overrule either the *Stratton* case or the *McDaniel* case or the *Rhodes* case. In consequence of the inconsistencies thus created, it follows that both Bench and Bar, as well as litigants—present and prospective—are cast into a state of utter inconclusion and uncertainty with reference to the rule of law here under discussion. To the end that this chaotic condition may be relieved, we respectfully suggest that this Honorable Supreme Court should grant the Petition for Writ of Certiorari herein sought.

CONCLUSION

Sincerely believing that a reversal of the decision of the majority of the Court of Appeals for the Fifth Circuit in

the case at bar, for the reasons hereinbefore assigned, is in the public interest and is of supreme importance to the jurisprudence of this nation, as well as to the important insurance industry, we earnestly urge upon this Honorable Supreme Court that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted and this cause be brought on for review by this Honorable Supreme Court.

Respectfully submitted,

THOS. B. RAMEY,
Citizens First National Bank Bldg.,
Tyler, Texas,
Attorney for Petitioner.

GORDON C. REEVES,
Fort Wayne, Indiana,
Of Counsel.

APPENDIX A

The Court:

I might first state this, gentlemen, that I see no difference in the Texas Rule on this matter as laid down by the Supreme Court in the *Clark* case which is the bellwether case on this question of fraudulent misrepresentations and the rule laid down by the Supreme Court of the United States in the *Pence* case. The elements of fraudulent misrepresentations are identically the same. Now, the right of trial by jury in the Federal Court in those cases in which they are entitled to trial by jury are identical to those cases of trial by jury in Texas. And, in the citations on whether or not a question of fact is raised, the same rule applies.

Now the Judges sitting in the Texas Courts might take a different view of it than the Judges sitting in the Federal Court. Now, on this point as in the *Pence* case, the three judges on the Supreme Court thought a question of fact had been raised.

In this *Stratton* case Judge Cameron thought a question of intent was raised. And, as I said a moment ago, after we tried this case and after hearing all of the evidence and after having done some briefing at the time of trial and I was convinced after the close of evidence that the Defendant was entitled to an Instructed Verdict save and except for the question of intent to deceive which I wasn't at all sure about. And that is why I sent this case to the Jury.

Now, there is no question even if we will say the question of fact might be raised as to whether the doctor had hypertension; there is not the slightest doubt in my mind that under any reasonable interpretation of the evidence in this case, Dr. Roosth died believing that he had hyptertension and believed it long before he made application for this insurance policy. There are undoubtedly misrepresentations made on his part and made willfully and with knowledge that he was making them. The first statement that he made about his not being in any hospital except the two hospitals that he listed. The other is that he said that no doctor had found his blood pressure to be above normal. He believed that statement to be false when he made it. His own handwriting in this record conclusively shows that. And then, of course, the fact that he stated that he hadn't consulted any other doctor within five years is bound to have been false and he knew that it was false. There is no question in my mind that those questions were material to the risk. There is no question in my mind as a matter of law under the undisputed evidence in this case that the insurance company relied on them.

Now, then, we come down to the real question as to whether or not he made those misrepresentations with the willful knowledge to misrepresent it to the insurance company. Now, we have to go back and take into consideration Dr. Roosth's mind and heart and from the reasonable inferences that could be drawn from this case. Now, there again his belief in the matter as to what he was suffering with becomes of great importance. Now, as I said a while

ago, Dr. Roosth believed at all times up until the time of his death that he was suffering from hypertension. He was a well educated man according to the evidence in this case. He had special training in the very field in which this condition falls. And there is no question in my mind that Dr. Roosth not only knew he had hypertension, but from the evidence in this case, he was considerably alarmed about the matter every time he wrote the doctors, except that last post card, he so indicated and particularly the letters he wrote. Now, if there ever was a case in which the intent to defraud was established as a matter of law, intent to deceive was established as a matter of law in my mind, this is such a case. To me, it is a most flagrant attempt to deceive the insurance company in this case. And couldn't have been done for any other purpose except with a deliberate and conscientious intent to deceive and cause them to write this insurance policy.

Therefore, the Motion of the Defendant for the entry of Judgment in accordance with the Motion for an Instructed Verdict will be granted and the Defendant shall prepare and enter an appropriate form of order after submitting it to the Plaintiff's counsel for approval.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17426

ROSA LEE ROOSTH,

Appellant,

versus

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(July 30, 1959)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: December 24, 1956, Dr. Harold Roosth (insured), a practicing physician in Tyler, Texas, applied to The Lincoln National Life Insurance Company (insurer) for $50,000 life insurance with appellant Rosa Lee Roosth, his wife, as beneficiary. The policy was issued on the same date after the usual

medical examination and was delivered to insured soon thereafter. After paying two monthly premiums the insured died February 7, 1957, the death certificate showing as the cause of death "Sub-arachnoid hemorrhage due to ruptured aneurism." The insurer declined the beneficiary's claim under the policy on the ground that insured had made false statements and misrepresentations in his written application for the policy knowing they were false and making them with intent to deceive the insurer, claiming that said false statements and misrepresentations were material to the risk assumed by insurer and were relied upon by it and it was induced thereby to issue the policy; and that the insured was not in good health when the policy was issued and delivered to him.

This civil action brought by the beneficiary was tried before court and jury and, after prolonged deliberation, the jury reported its inability to agree upon a verdict and was discharged. Thereupon the court, after hearing argument and considering briefs, entered judgment granting insurer's motion for directed verdict based upon the averment that each of the defenses relied upon by it had been established by "the uncontradicted and or great preponderance of the evidence." The question presented by this appeal is whether the defenses relied upon were established by evidence of such character that the court below was justified in deciding that no jury issues were presented, and that the defenses should be sustained as a matter of law; and that the insurer had not waived, or was not estopped to prevail on, its motion for directed verdict by reason of notice of facts omitted from the appli-

cation it acquired prior to the issuance of the policy. A careful reading of the record and briefs convinces us that, under Texas law, the evidence required that the issues be decided by the jury and that it was error to decide them as a matter of law.

The trial below was prolonged and the record is made up largely of the testimony of nine doctors who gave their opinions based, to a large degree, upon hypothetical questions. Without doubt, there is support in the record for a jury finding in favor of the insurance company, but that is not the question which is before us. Ours is the duty to search the record to see if it contains credible evidence from which the jury would have been warranted in finding for the appellant. The opinion, therefore, will be confined largely to pointing out the evidence favorable to the appellant and the law of Texas under which, in our opinion, a case for the jury was made out.

A few fundamental facts should be kept in mind as the details are considered. The first is that Lincoln made a specialty of substandard risks and its premium charges were based accordingly. The annual premium normally applying to the policy issued to insured was $1094.00 per year, while the charge made for the policy issued to him was $1,922.00 per year, an uprating of 74.7 per cent. The insurer knew that the doctor had had a mycocardial infarction, commonly known as a coronary thrombosis, in 1948, and that the American General Insurance Company had, five years thereafter issued him a rated-up

policy.[1] Insured knew that he was a permanent cardiovascular cripple and, despite his comparative youth, had cut down on his activities to protect himself from future attacks. He was inevitably heart conscious and was probably never free from a measure of anxiety and foreboding. The insurer also knew this. That occurrence was the basic ingredient of the contract between the two and the congeries of considerations attending it, the causes, the concomitants and the consequences were logally taken into account in the execution of the contract, and every act by the parties in connection with it should be interpreted in the light of this fundamental fact.

The idea of insurance originated, not with the insured, but with the insurer. The insured felt sufficiently encouraged concerning his recovery and general physical condition to go in with his brother, also a doctor, and construct a clinic, which was occupied in the year 1956. Insured was exploring the covering of the mortgage on the clinic by what was referred to as "mortgage insurance." But Lincoln's agent learned of the situation and importuned insured to purchase life insurance instead, sending in to Lincoln on Nov. 1st an inquiry whether it would be interested in writing it. The amount desired by insured was $26,000, and the application first signed by him November 10, 1956 was for a policy in that amount. The agent inserted in that application the request that an additional policy in the amount of $24,000 be issued. The physical

[1] The record reveals that Lincoln was reinsurer of some of American General's risks that they swapped information and cooperated in determining whether applications for insurance would be accepted.

examination by the company examiner, Dr. C. B. Young, was based upon the November 10th application. Insurer's agent, however, testified that the policy was issued on the application dated December 24th, but upon the medical examination made November 11th.

Lincoln pled affirmatively that insured willfully made false answers to specific questions asked him by the medical examiner, as set out in the footnote.[1] It is first complained that insured misrepresented the cause of the death of his mother. Since insured was thirteen years of age at the time of her death, it is clear that he knew nothing of the cause and the answer on his application is bound to have been the repetition of what he had heard. His brother explained that family history revealed—as the brother expressed it, they were taught—"That she died from a kidney condition resulting from childbirth." That is essentially what the death certificate showed.

The Company introduced evidence that, in 1950, insured told someone making a physical examination of him that

[1] "9. Mother Age at Death 40 Cause of Death—Childbirth."

"11. Have you now any disease or disorder? If yes give full particulars." Answer: "No."

"13. Have you ever been in a hospital, clinic, sanitarium or institution for observation, treatment or operation? If so, give date and details . . ."

Answer: "Medical Center Hosp. Nov. 1955.
Mother Frances [Hospital]
Hemmorrhoidectomy 1950
Porter Bailes, Jr. [Surgeon]

"14. Have you ever had any of the following diseases or symptoms? a. Apoplexy, Paralysis, Epilepsy, Loss of Consciousness, Dizziness, Nervous Breakdown, Headaches." Answer: "No."

"g. Has any physician in past five years found your blood pressure above normal?" Answer: "No."

"h. Have you ever had X-ray, electrocardiogram or blood studies? If so, give full particulars." Answer: "No."

"i. Have you consulted any physicians or practitioners the past five years for any other causes?" Answer: "No."

his "mother died at 39 of cerebral vascular accident." His recollection then was no better apparently than it was when he applied for his insurance. At the time of the application he gave his mother's age at death at 40. At the time of the asserted admission against interest in 1950 he gave her age as 39. The death certificate showed that she was 45. If the answer should be considered of any consequence, the jury had a right to believe that the insured gave the best information available to him. Especially is this true when, on the same application, he showed that his father died at the early age of 62 of coronary thrombosis, and the evidence is replete with the showing that his brother was the victim of extreme hypertension for which a serious operation was performed in 1950.

Skipping over to question No. 14 (a) concerning seven listed afflictions, including dizziness and headaches, there is abundant evidence that insured had never suffered from dizziness or headaches of any consequence. The evidence to the contrary can serve only to make this a jury question.

The remaining questions with respect to which the insurer claims false and fraudulent misrepresentations may be grouped, because the same evidence relates to all of them. The insured answered, in response to question 13, Note 2, *supra*, that he had been in two hospitals, one in 1955 and one in 1950. He did not answer that he had never been in any other such institution. Moreover, the question related only to "observation, treatment or operation." The Company's chief point about this answer is

that insured had, in November, 1950, undergone a complete physical examination by the doctors of the Smithwick Clinic at Massachusetts Memorial Hospital in Boston. In that connection, the evidence showed that insured was not admitted to said institution as a patient or for treatment. His check-up was a mere incident to his trip to Boston to take his brother who was seriously ill of hypertension, and the insured merely submitted to the general examination during the time he was detained there waiting for his brother to develop enough strength for the serious operation.

The most serious admission against interest relied upon by appellee was contained in the case history which was taken from insured on this occasion. The intern taking the case history made this note: "About four years ago after discharge from the army with no reservation it was noted that he had a BP of 160 100-110. He was completely asymptomatic until the middle of September, 1948, when he had two weeks of 'indigestion' followed by a full blown posterior myocardial infarction. He recovered and slowly has increased his activity to 5-6 hours of work (internist) a day. Since the coronary he has ceased smoking and has been taking 150-200 mg of dicumarol every other day, following it with a prothrombintime once a week."

The physical examination then conducted showed an average lying blood pressure of 186 129, but it fell markedly after rest and, under sedation, reduced to 110 70; the testimony disclosed also that the eyes were "clear," that the heart was not enlarged, and that the electrocardiogram was normal.

In connection with this evidence it should be considered that Lincoln, in its manual of instructions to medical examiners, advised that blood pressure history beyond five years should usually be disregarded; and, as to more recent history, the following instruction was given: "History three to five years ago—if highest systolic in history 3 to 5 years ago was less than 170 and highest diastolic less than 106, disregard . . ."

Several things connected with the 1950 checkup are worthy of note. One is that the history given by the insured to the Boston doctors began with his discharge from military service and included the period of his coronary thrombosis and ended more than six years before the application for insurance; and the moderately elevated blood pressure was manifestly connected in insured's mind with the thrombosis experience.

The examination in 1950 by the doctors of Smithwick Foundation showed insured's blood pressure to be high, but the other tests for hypertension were negative. At that time, insured was scarcely two years away from the grueling experience of the "full blown myocardial infarction" and he was in Boston with full responsibility for a very sick brother, charged with the duty of deciding whether a serious operation should be performed. No doctor who testified held the idea that such an experience would not of itself produce an unusually high blood pressure resulting from nervousness and worry. That the elevation of pressure then discovered was connected with emotional stress is buttressed by the fact that, when the

stress was eliminated by sedation, his pressure dropped to the subnormal figures of 110 70.

Under like circumstances as those detailed with respect to the first visit, insured was examined at the same institution Nov. 25, 1951,[3] and again in June, 1953. Both times, the blood pressure levels were well under those Lincoln had established as such a safe standard as to be disregarded.

In connection with that evidence, it should be noted that the insured's doctor brother testified that he had, during the years, taken the insured's blood pressure on numerous occasions and had never found it high; and Dr. Ruskin testified substantially the same thing. Except, therefore, for the one time in 1950 when insured was under such tremendous nervous strain, there was no showing that insured's blood pressure ever exceeded that which Lincoln instructed its examiners to disregard. In addition to this, insured's blood pressure was apparently satisfactory to American General when it issued its policy in 1954, and was 130 85, as noted by the insurer's examiner on the report of examination of insured upon which this policy was issued. Moreover, on the preliminary report made Nov. 1, 1956, as a feeler to determine whether Lincoln would be interested in issuing the policy, it was noted that a current or recent 12-lead electrocardiogram would be required by it.

During all the years of their association in the practice of medicine insured had never mentioned to his doctor

[3] The average blood pressure found in 1951 was, lying, systolic 138, diastolic 86, and standing, systolic 140 and diastolic 99; in June, 1953, the figures were lying, systolic 148, diastolic 92, and standing, systolic 156, diastolic 96.

brother that he suspected that he was suffering from hypertension of any sort; nor had he mentioned the subject to his doctor (Ruskin) nor to his wife.[4]

Appellee urges that the fact that insured took the drug Raudixon sporadically was indicative of the fact that he knew he was suffering from hypertension. The doctors disagreed about the properties of this drug, some considering it primarily a good tranquilizer and only the mildest remedy for hypertension. It was also shown that the insured followed at times a salt poor diet. Such a course was indicated for hypertension, but it was also indicated for loss of weight, which insured was constantly trying to achieve, and for the lessening of the likelihood of recurrence of coronary thrombosis, which was a constant source of worry to him and a logical explanation for much of the proof upon which appellee places the greatest reliance.

If insured was suffering from hypertension, there was ample proof that it was not essential hypertension, that is, chronic or presistent, amounting to a disease; but was occasional hypertension resulting from the fact that he was a tense individual, reacting spontaneously to such stimuli as worry, excitement, frustration. Those closest to him stated that he appeared to be in good health, led a normal life, and did not direct his effort at avoiding strain and tension which would ordinarily be expected of a doctor who suspected that he was the victim of essential hypertension. The foregoing brief analysis demon-

[4]This Court indicated, in the recent case of World Insurance Co., etc. v. Pipes, 1958, 255 F. 2d 464, 467, that the fact that the insured there never told his family or close friends that he had nephritis was strong support for the finding of the trial judge that, if he did have the disease, he did not know it.

strates that reasonable minds would probably reach different conclusions with respect to the questions whether insured had hypertension at all and if so, its character; whether he knew of the condition if it existed and considered it important; whether he deemed it a part of the thrombosis episode and other like questions. That being so, they presented issues of fact and not of law.

The testimony of Dr. Ruskin was of particular importance to appellant. He was a professor in the University of Texas and had written some eighty papers on cardio vascular diseases. He first examined insured in 1949 and continued to see him and confer with him through the years until the end of 1956. He had never found any evidence from his extended examinations that insured had hypertension in any form, and it had never been mentioned to him. While on the stand he told of writing a letter in February, 1955 to American General Life Insurance Company, which is reproduced in the margin.[5]

[5] "American General Life Insurance Company, Houston 1, Texas.

"Attention: Dr. Ghent Graves, Medical Director

Dear Mr. Graves:

Dr. Roosth has been under my care since December 2, 1959, at which time the second EGG sent you was taken. He had a myocardial infarction in August of 1948; was treated in Tyler and recovered uneventfully. At that time G. I. series, gall bladder series barium enema, all negative. I have seen him frequently until June 1954, during this time he has never had any symptoms and his physical examination, including size of heart and fluoroscopy of the heart have always been negative except for blood pressure findings—highest on December 2, 1949, 105/100, but always since then below 140/90. He has taken excellent care of himself, including prolonged anticoagulant thereapy under my direction. Report from Massachusetts Memorial Hospital on June 1943 noted essentially the same findings and EGG (Q2 and Q3). Urinalysis blood counts, sedimentation rates, all normal.

Prompt return of EGGs will be appreciated.

With best regards,
Sincerely yours,
Arthur Ruskin, M.D.
Assoc. Prof. Int. Med.
Univ. of Tex. Med. Br.
Galveston, Texas."

Mr. Balay, underwriter for Lincoln National, admitted that the letter was in Lincoln's file. The letter was submitted to Lincoln by American in connection with insured's application to American for insurance. Lincoln reinsured a great many of American General's risks, and it was the practice of the two companies to exchange information.[6] Mr. Balay also was examined concerning confidential reports made by investigators who had contacted people who were close to the insured and the report showed him to be a man in apparent good health and one who worked regularly.

This letter of Dr. Ruskin's, taken in connection with the underwriter's testimony, would warrant the finding by the jury that the insurer was in possession of facts sufficient to put it upon inquiry at the Massachusetts Memorial Hospital, and that failure so to do would amount to a waiver of the claim that the appellant is barred from recovery by failure of the insured to reveal the examinations made in Boston. At all events, the evidence has persuasive force towards warranting the jury in finding that the insurer did not rely on such failure of the insured to disclose the fact of said examination.[7]

A careful reading of the entire episode involving the examinations by insured in Boston leads to the conclusion

[6]The doctor Ruskin letter referred to an examination at Massachusetts Memorial Hospital in June, 1943, but he explained that this was a typographical error and the date should be 1953. The content of the letter shows that the date is incorrectly stated, because it refers to an examination made after insured's heart attack in 1948.

[7]Perry et al. v. Citizens Life Ins. Co., Ct. Civ. App. Tex., 1942, 163 S. W. 2d 743; Terry et ux v. Texas Prudential Ins. Co., Ct. Civ. App. Tex., 1935, 77 S. W. 2d 761; American Fire & Casualty Co. v. Eastham, 5 Cir., 1950, 185 F. 2d 729; and Pilot Life Ins. Co. v. Pulliam Motor Co., 4 Cir., 1956, 229 F. 2d 912.

that failure to reveal these examinations is not nearly as damaging to appellant's case as the Company contends. At all events, the evidence, considered in connection with the countervailing proof on appellant's behalf, raises nothing more than a jury question on this phase of the case.

Much of what has been written applies to the contention of appellee that the insured gave knowingly false answers to questions 11 and 14 (g) and (h).[1] From what has been said above it is clear that insured did not commit any fraud when he answered that he was not at that time suffering from any disease or disorder.[2]

This brings us to the alleged fraud in answering subparagraphs (h) and (i) of Question 14, asking whether insured had had X-ray, electrocardiogram or blood studies, and whether he consulted any physicians or practitioners the past five years for any other causes. In judging insured's answers to these questions, it must be borne in mind that he had consented to a trial inquiry on November 1st, had signed an application on November 10th, and a subsequent application on December 24, 1956, in all of which he had disclosed his myocardial infarction of 1948 and the fact that the American General Insurance Company had rated him up because of the increased risk resulting from it. Without dispute he had had many electrocardiograms made and had been in constant touch with

[1] It appears that there is no evidence indicating that insured's answer was false when he gave a negative response to the question whether any physician had found his blood pressure above normal within the past five years.

[2] Excepting, of course, the disabilities following the heart attack of 1948, which the court below and all parties except from the questions presented.

Dr. Ruskin and his brother in connection with the aftermath of the 1948 seizure. Dr. Ruskin testified, for instance, that in November or December, 1956, Dr. Young (Lincoln's examiner) and insured telephoned him long distance several times in connection with "a development of immature contractions or extra beats, skips and jumps of his heart which he was concerned about." The doctor did not consider the development of consequence, stating that they frequently occur following myocardial infarctions as well as in cases of perfectly normal individuals "when they are nervous, or exhausted." Manifestly insured had no cause to withhold from the insurer the information that he had consulted these doctors frequently.

Anyone would know that a coronary patient remains heart conscious and is reminded of his disability by the necessity of taking medicine constantly. The form of the questions is such that insured could logically have thought that they referred to his consultation with doctors, causing electrocardiograms to be made, etc., with respect to disabilities other than those connected with the 1948 seizure. At least, the jury was justified in finding that he did honestly so construe the questions, even if they thought that he was mistaken. The seizure of 1948 was an open book and insurer was given opportunity, at its leisure, to make any investigation it desired with respect to it and its consequences and presumably it did so. In judging insured's intent, his answers must be considered from the viewpoint of what was in his mind when he gave them.

But brief consideration need be given to the contentions which appellee urges so fervently, based upon hindsight. These are predicated upon the death certificate issued to cover the demise of insured and the autopsy performed with the consent of appellant. The death certificate furnished by the attending physician of insured showed that the condition directly leading to death was sub-arachnoid hemorrhage and the antecedent causes were ruptured aneurysm due to Circle of Willis. The parties agree that, if the cause of death was that stated in the certificate, there would not be proof that the misrepresentations relied upon were material or that they increased the risk, because supposed hypertension would not be embraced within the cause as certified.

But the Company seeks to avoid the statements of the death certificate, claiming that the autopsy demonstrates that the certificate is in error and that the death resulted from a cause to which hypertension would be a contributing factor. Much of the hardest fighting revolved around this conflict between the death certificate and the autopsy as established by the report and the testimony of the doctor who made it. The Company's witnesses gave their opinions that, if the findings of the autopsy were correct, the insured must have died of hypertension. Appellant's doctors disagreed. Much of the expert testimony of appellee is discounted because the doctor who performed the autopsy admitted that, although he did not find evidence of an aneurysm, there was a possibility and even probability that evidence of its existence had been de-

stroyed by its "explosion."[1] These conflicts were for jury decision.

An extended discussion of the law is not indicated, as appellee concedes in its brief that its defense cannot succeed unless these five elements are proven: "(1) A false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) and with intent to deceive; (5) with action taken in reliance upon the representation." This accords with the appellant's argument and since all agree that this case is to be decided under Texas law and that, in considering it, we are sitting as a Texas Court, it will be sufficient if we simply list the authorities which establish these principles as the law of Texas."[2]

[1] "I wish to be explicit about this, that I have stated in this autopsy protocal that I did not find an aneurysm. This does not, cannot be taken that there was not one present at one time or another because this hemorrhage which Dr. Roosth suffered was a massive thing which would, I think explosive would be the best word to describe the damage that type of thing can produce. And it is possible and it may be probable that an aneurysm existed and an aneurysm served as the weak spot through which the hemorrhage started and that the entire aneurysm was destroyed and could not be recognized at the time of the autopsy, I would say that is possible, that may be what actually happened."

[2] 14 Vernon's Texas Civil Statutes, Art. 21.16 provides:

"Any provision in any contract or policy of insurance issued or contracted for in this state which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it is shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case."

And it is provided in 14 Vernon's Texas Civil Statutes, Art. 21.18:

"No recovery upon any life, accident or health policy shall ever be defeated because of any misrepresentation in the application which is of material fact and which does not affect the risks assumed."

And see Clark v. National Life Insurance Co., 1947, S. Ct. Tex., 200 S. W. 2d 820; Washington National Insurance Co. v. Anderson, C. C. A. Tex., 1936, 94 S. W. 2d 263; Great Southern Life Insurance v. Darfe, 1941, Comm. of App. Tex., 151 S. W. 2d 197; Vann v. National Life and Accident Insurance Co., 1930, Comm. of App., Tex. 24 S. W. 2d 347; and Coxson v. Atlanta Life Insurance Co., S. Ct. Tex., 1944, 179 S. W. 2d 943.

Appellant relies heavily upon the decision of this Court in *Madden v. Metropolitan Life Insurance Co.*, 1943, 138 F. 2d 708. A reading of the case shows that we held that "a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury; and that (even though a question relates to matters of fact such as whether there was a consultation rather than of opinion as to whether insured was ill or suffering from a disease), unless the evidence admits of no other conclusion than that there was an intent to deceive, it is for the jury to determine whether the answer was fraudulent in fact, that is, made with intent to deceive, or whether it was given in good faith, that is, without conscious intent to defraud."

We were there applying the law of Florida as announced in *Metropolitan v. Poole*, 1941, S. Ct. Fla., 3 So. 2d 386. The law of Florida as announced in that case seems to square with the law of Texas. Indeed, as above stated, there seems to be no disagreement between the parties that appellee's affirmative defense must fall unless it proved that insured made false representations to material facts with knowledge of their falsity and with intent to deceive, and that the policy was issued in reliance upon such representations. And these propositions must be established by proof which can lead reasonable minds to only one conclusion. This, we believe, appellee has failed to do.

The contention of appellee that insured was not in good health when the policy was issued and delivered, so that it did not become effective under the terms of the policy, falls under the same analysis of facts as that set forth above in answering the contention that false answers were given in the application.

The burden was upon the appellee to sustain this contention and to show that there was no proof from which the jury could have found that insured was in good health at said time, excepting, of course, the disability under which he labored resulting from his coronary thrombosis. This phase of the law of Texas was discussed in our recent case of *American Home Life Ins. Co. v. Zuniga*, 1955, 228 F.2d 403. Under that case and the Texas cases discussed in it, this question was also one for jury decision.

Appellee labors here under the universally accepted rule that "Fraud is never presumed, and the burden [is] on appellant to prove it with reasonable certainty by a preponderance of convincing evidence."[12] That rule certainly has appropriate application here. The agent seeking to induce appellee to accept Dr. Roosth as its insured represented more than once that he was a prominent and outstanding citizen in his community. Appellee's evidence shows that he was a man of means. A good reputation does not come without effort. It results from adherence day by day to honor and decency and good faith. It ought not to be destroyed by proof which is not clear and convincing. It is a rare case which would justify the finding that, as

[12]Williams v. Penn Mutual Life Ins. Co., 5 Cir., 1928, 27 F. 2d 1, 3.

a matter of law, a man of character has stooped to the cheap fraud relied upon here. We thing that it was error for the judge so to decide. The case, in all of its aspects, should be decided by a jury.

In order that, on another trial, it may be submitted to a jury for decision the judgment of the court below is reversed and the case remanded.

REVERSED and REMANDED.

APPENDIX C

HUTCHESON, Chief Judge, Dissenting:

I agree fully with the majority that in a suit on a policy of life insurance, in order for the defendant to recover, there must be shown: a false representation, in reference to a material fact, made with knowledge of its falsity, and with intent to deceive. I agree, too, that under the controlling statutes and case law, normally these are questions of fact "to be determined by the court or jury trying the case."

As the Texas authorities show, however, while this is normally so, this does not mean that every insurance case must be sent to the jury. On the contrary, it is the established law of Texas that in the trial of such a case, as in the trial of other civil cases, uncontroverted issues are not to be submitted to a jury but are proper subjects for peremptory instructions. Tex. Jur. 41B, Sec. 401, pp. 489-494; *Clark v. National Life & Accident Insurance Co.*, 145 Texas 575; *Jefferson Life v. Quehler*, 298 SW(2) 619.

Under that rule, it seems clear to me that, taken in the light most favorable to the plaintiff, it must be concluded that the evidence incontrovertibly, that is as matter of law, establishes the facts required to support the instructed verdict.

I have not overlooked the fact, of which the opinion makes so much, that the insured was recognized as a substandard risk because of his having had a coronary

thrombosis in 1948. Indeed, I think this fact cuts the other way. Taken in connection with the undisputed evidence that the misrepresented fact was greatly material to, and greatly increased the substandard risk being assumed, the deliberate falsity and materiality of the representations stand starkly out. In short, it seems to me that when this case is viewed, piecemeal or as a whole, in the light of the undisputed facts of the case, including the fact admitted in appellant's brief that the insured "made misrepresentations in his application concerning (1) his failure to report his examination at Massachusetts Memorial Hospial, (2) his failure to report an examination by a physician within the past five years" and that "on these questions defendant would be entitled to an instructed verdict but for the necessity of proving that they concerned matters (1) material to the risk, (2) were made with the intent to deceive, and (3) were relied on.", it is taxing credulity far beyond its utmost limits to contend or claim that what was said and left unsaid was not done knowingly, deliberately, and with the intent to deceive.

It will serve no useful purpose to set out the evidence. The stark facts which dominate this case and force the conclusion that the district judge was right in directing a verdict, including particularly plaintiff's skill and proficiency as a doctor in the very field with which this admitted condition of his had to do, are sufficiently stated in the majority opinion. Cases which I think require the view I take are: *Rhodes v. Metropolitan Life*, 172 F(2)

183; *Pence v. United States, 316 U.S. 332; McDaniel v. United States*, 196 F(2) 29; *United States v. Stratton*, 232 F(2) 880.

I respectfully dissent.

A true copy
Test: /s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

(SEAL)

Sep. 29, 1959

APPENDIX D

JUDGMENT.

Extract from the Minutes of July 30, 1959

No. 17426

ROSA LEE ROOSTH,

versus

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for another trial;

It is further ordered and adjudged that the appellee, The Lincoln National Life Insurance Company, be condemned to pay the costs of the in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Chief Judge, Dissenting."

APPENDIX E

ORDER DENYING REHEARING

Extract from the Minutes of September 4, 1959.

No. 17426

ROSA LEE ROOSTH,

versus

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Hutcheson, Chief Judge, Dissenting."

* * * * *

FILE COPY

Supreme Court, U.S.
FILED
NOV 20 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

No. 502

THE LINCOLN NATIONAL LIFE INSURANCE CO.,
Petitioner (Defendant),
vs.
ROSA LEE ROOSTH,
Respondent (Plaintiff).

PETITION FOR CERTIORARI

RESPONDENT'S BRIEF

CHAS. F. POTTER,
Fourth Floor Peoples Bank
Building,
Tyler, Texas,
Attorney for Respondent.

Of the Firm of:
SPRUIELL, LOWRY, POTTER,
LASATER & GUINN.

WARLICK LAW INC — 1207 HORD STREET — DALLAS — RI 1-6711

INDEX

	Page
Caption	1
Statement of the Case	1
Reasons Why the Application Should Not Be Granted	2
Argument	2-3
Summary of the Facts	3-8
Analysis of Most Material Exhibits	8-14
Review of Other Material Evidence	14-29
Summary of Evidence Favorable to Plaintiff on Issues Which Should Have Been Submitted	29-40
Authorities Cited by Petitioner — Federal Cases Dealing With National Service Life Insurance Policies	41-50
Good Health—A Fact Question	50-56
Conclusion	56

Page

American Fire & Casualty Co. v. Eastham (5 C. C. A.), 185 F. 2d 729 34

American Home Life Ins. Co. v. Zuniga, 228 F. 2d 403 52, 55

American National Ins. Co. v. Lawson, 133 Tex. 146 56

Baker v. Ft. Worth Mutual Benefit Assn. (Comm. App.), 280 S. W. 165 34

Cardwell v. United States, 5 C. C. A. 186 Fed. 2d 382 43

Clark v. National Life Ins. Co., S. Ct., 200 S. W. 2d 820 47

Coxson v. Atlanta Life Ins. Co. (S. Ct.), 179 S. W. 2d 943 51, 53, 55

Equitable Life Ins. Co. v. Alvarez (5 C. C. A.), Tex., 141 F. 2d 551 44, 50

Great Southern Life Ins. Co. v. Doyle (Comm. App.), 151 S. W. 2d 197 48

Hughes v. American National Ins. Co., 146 S. W. 2d 470 56

John Hancock Mutual Life Ins. Co. v. Esparza, San Antonio C. C. A., 286 S. W. 2d 695 (N. R. E.) 53

Madden v. Metropolitan Life Ins. Co. (5 C. C. A.), Fla., 133 F. 2d 708 45

Metropolitan Life Ins. Co. v. Madden (5 C. C. A.), Fla., 117 F. 2d 446 45

McDaniel v. United States (5 C. C. A.), 196 F. 2d 291 43

Morris v. Tatum, 152 S. W. 2d 871 56

Pense v. United States, 316 U. S. 332, 86 L. A. 1510 41

Perry v. Citizens Life (C. C. A.), 163 S. W. 2d 743, 747 34

Phipps v. American National Ins. Co., 116 S. W. 2d 800 56

Page

Sovereign Camp v. Derrick, C. C. A., 64 S. W. 2d 982 55

Terry v. Prudential (C. C. A.), 77 S. W. 2d 761 34

Texas Prudential Ins. Co. v. Dillard (Tex. S. Ct.), 307 S. W. 2d 242 34-35, 54, 55

Union Assurance Soc. v. Toliver (5 C. C. A.), F. 2d 405, 408 34

United States v. Stratton (5 C. C. A.), 232 Fed. 2d 880 43

Vann v. National Life and Accident Ins. Co., Comm. App., 24 S. W. 2d 347 50, 55

Washington National Ins. Co. v. Anderson (Dal. C. C. A.), 94 S. W. 2d 263 47

World Insurance Company v. Pipes, 5 C. C. A. La., 255 Fed. 2d 465 30

In the

Supreme Court of the United States

No. 502

THE LINCOLN NATIONAL LIFE INSURANCE CO.,
Petitioner (Defendant),

v.

ROSA LEE ROOSTH,
Respondent (Plaintiff).

PETITION FOR CERTIORARI

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

We cannot accept the statement of the case as contained in the Petition for Certiorari because rather than a statement, it is an argument. The case is more aptly stated in the opinion of the Circuit Court, and we will not attempt to elaborate upon it.

REASONS WHY THE APPLICATION SHOULD NOT BE GRANTED

1. The Circuit Court of Appeals was correct in holding that jury issues were raised by conflicting evidence and that the Trial Court should not have withdrawn the case from the jury.

2. There is no conflict by the decision of the Circuit Court of Appeals with prior decisions of this or other circuit courts or with prior decisions of the Supreme Court, or with decisions of the State courts in the State of Texas.

ARGUMENT

The defendant (petitioner) had the burden of proving the policy of life insurance was procured by fraud. This, according to the law of Texas, includes proof of the five elements noted in the Circuit Court's opinion.

The crux of the defense is:

(1) That Harold was not in good health because he had essential hypertension, the disease. (We denied he had the disease.)

(2) That he was examined in a Boston hospital in 1950, 1951, and 1953.

(3) That his mother died of hypertension or cerebral vascular accident. (We offered evidence to the contrary.)

(4) That he answered falsely so as to conceal these facts, with the intent to deceive the company, and that the company relied. (We offered circumstantial evidence to

show he acted in good faith and that the company had knowledge of the hospital examination from other sources, so could not have relied.)

If the evidence raised an issue on any one of these points, then it should have been submitted to the jury.

It is readily seen that if Harold thought himself to be in good health (except for the history of a heart attack), there was no occasion for him to conceal the fact of his examinations in Boston, no basis for the charge that he had the intent to deceive, because, at least in his mind, there was no necessity to deceive.

If Harold was not afflicted with essential hypertension as a disease, the jury might consider that his examinations in Boston were not material to the risk.

A proper consideration of this case necessitates a review of the evidence as it reflects on these matters, to determine whether there is any basis for the broad statements by Petitioner that the "majority decision abridges the right of the trial court to direct verdict," and that "majority decision places undue burden on life insurance industry." If the evidence, including both direct evidence and circumstances, is so conflicting that the jury might find either way on the questions, the case should be submitted to the jury.

SUMMARY OF THE FACTS

We must concede that in November, 1950, when Harold was examined at Massachusetts Memorial Hospital his

blood pressure was found to be high, above normal, but not in 1951 or 1953. The company's medical witness said it was high all three times, but other medical witnesses said that in 1951 and 1953 his pressures were within normal range. All medical witnesses agreed that anxiety and strain could elevate the pressure and that Harold's concern and responsibility for Bennie, his brother, in 1950 could account for his elevated pressure at that time. The elevation in pressure would be in proportion to the degree of anxiety.

In 1950 when Harold accompanied his brother to Boston, Bennie was in grave danger of death from essential hypertension, heart and kidney involvement. Bennie was to be operated, a splanchnicectomy to sever the sympathetic nerves which influence blood pressure. Harold Roosth was Bennie's doctor and charged with Bennie's care and responsibility to decide whether Bennie was strong enough to stand the operation. These were the circumstances under which Harold himself underwent a complete physical examination when his pressure was found to be above normal.

There was a difference of opinion among the doctors as to what was normal pressure. Defendant's doctors testified that Harold's blood pressures in 1950, 1951, 1953 and on other occasions were above normal from which they formed the opinion that he was subject to excessive hypertension; that is, essential hypertension, which is a disease. Other doctors disagreed as to what was normal blood pressure, testified that Harold's blood pressure was never above normal on any occasion except when Bennie was operated and that the occasion of stress and strain may have been

responsible for this. They testified that in their opinion that Harold did not have essential hypertension or excessive hypertension. Other testimony and circumstances were offered to show that Harold did not believe himself to be subject to the disease, though we recognize that as opposed to this, circumstances were offered indicating that Harold might have believed that he did have a disease.

Terminology becomes important. "Hypertension" is a general term referring to any elevation of blood pressure, though loosely used it may refer to the disease, essential hypertension. This disease is defined as an elevation of blood pressure from an unknown cause. R. 226.

Dr. Grollman testified:

> "Q. Doctor, will you tell us, please, what is meant by the term hypertension?
>
> "A. The term is often used loosely just as synonymous with high blood pressure but in a more specific sense it is used to mean a disease designated more accurately perhaps as hypertensive cardiovascular disease or just hypertensive disease which is characterized among other things by a rise in blood pressure and other changes which occur in the organs." R. 353.

Dr. Muntz defined "essential hypertension" means hypertension from an unknown cause. "Hypertension itself means elevated blood pressure." R. 624.

Dr. Ruskin said "Hypertension is just a term meaning high blood pressure." R. 706.

Although it is clear that "hypertension" does not strictly refer to a disease such as "essential hypertension" (which

they say Harold had), it was a term used indiscriminately throughout the trial to mean whatever the doctor using it had in mind. For instance, there is hypertension caused by kidney malfunction which is not essential hypertension. R. 356.

This terminology is important because its looseness may account for some of Harold's writings referring to "my hypertension," later discussed. He may have meant merely an elevation of blood pressure, not "essential hypertension" as claimed by the Company.

There was a variety of testimony as to the cause of Harold's mother's death, his statement to the doctors at the Boston hospital, the death certificate, the family history, and the testimony of a surviving brother, all of which presented, we submit, an issue for the jury to decide.

The cause of Harold's death was subarachnoid cerebral hemorrhage (in the coverings over the brain, at the base of his brain). His death occurred at the end of an ordinary day's work in the absence of any stress, strain or emotional disturbance. The cause of death was determined by a post mortem examination. The evidence was in conflict as to what caused or contributed to the hemorrhage. It was contended by the insurance company that it resulted from essential hypertension. The plaintiff offered evidence showing that Harold took prolonged anti-coagulant therapy; that is, took a medicine dicoumarol to reduce the clotting

capacity of the blood, that the insurance company was fully aware of this treatment which was taken to prevent a recurrence of the 1948 heart attack. (Incidentally, it is the same treatment which President Eisenhower has taken since his heart attack.) The evidence was undisputed that this is a dangerous drug which, for unknown reasons, and without warning, may cause the prothrombin time to get out of hand. Prothrombin time is a test made to determine the clotting capacity of the blood. The blood may almost entirely lose its clotting capacity, a dangerous condition referred to as dicoumarol poisoning which may result in hemorrhages in any part of the body, including a cerebral hemorrhage. Some of the doctors testified that it was entirely possible that Harold Roosth's cerebral hemorrhage may have been caused by dicoumarol poisoning. That such hemorrhages may occur in the absence of any elevation of blood pressure.

We must recognize that certain of the alleged misrepresentations are matters of opinion as distinguished from matters of fact. Others are properly classified as fact misrepresentations. The opinion matters concern good health, whether Harold had essential hypertension, whether his blood pressure had been found to be above normal, and what was the cause of his mother's death. The factual misrepresentations involve his failure to disclose that he had been examined at the Boston hospital and had consulted physicians or practitioners within the past five years.

ANALYSIS OF MOST MATERIAL EXHIBITS
(All original exhibits sent up)

Defendant's Exhibits 1, 2 and 3 are the application (Nov. 10, 1956) and medical examination (Dec. 24, 1956) for the insurance showing the representations made by Harold referred to in Plaintiff's petition.

Defendant's Exhibit 17 is the personal history statement of Harold Roosth, taken by Dr. Horowitz, an intern, November 15, 1950, when Harold was first examined at Massachusetts Memorial Hospitals. The material portions read:

> "This is the first M.M.H. admission of this 35 year old physician with chief complaint of hypertension—four years.
>
> "Present illness: About four years ago after discharge from army with no reservation it was noted that he had a b.p. of 160 100-110. He was completely asymptomatic (without symptoms) until the middle of September 1948 when he had two weeks of indigestion followed by full blown posterior myocardial infarction. He recovered and slowly has increased his activity to 5-6 hours of work (internist) a day. Since the coronary, he has ceased smoking and has been taking 150-200 mg. of dicoumarol every other day, following it with a prothrombin time once a week. It runs about 50 per cent of normal. He has no cardiac symptoms of any kind since a complete checkup a year ago shows no change. About eighteen months ago he started having pounding in the head at night when lying down. This has continued. He has kept on a low cholesterol diet for several years, but has not been on salt restriction, rice diet or veraloid. He has been gaining some weight. His diastolic has risen recently to 120, which prompted him to have some studies. He

has never had albumin, has had no I.V.P. studies. He denies visual difficulties, bleeding from any orifice, urinary symptoms or edema. As stated above there have been no cardiac symptoms • • •.

"Family history: Mother died at 39 of cerebral vascular accident. Father died at 61 of coronary; he also had gout. One brother is in M.M.H. now, having had bi-lateral LD Splanch for hypertension.

"Physical Exam.: b.p. 190-120 p. 74 R 20. This is an w.d. (well developed) w.n. (well nourished) man in no distress • • •.

"Impression: 1. Hypertension
2. Scoliosis
3. Unstable left knee

"11 18 50 pt. (patient) discharged. s (without) operation to be followed by the Foundation."

(Note: Was hypertension used to designate essential hypertension the disease or only an elevation of blood pressure?)

Defendant's Exhibit 18—Preoperative History—was taken by Dr. Kinzey, the material portion of which shows:

(1) Known duration of elevated blood pressure—four to five years • • •.

(Note—this refers to Harold's "elevated blood pressure" and not essential hypertension.)

(3a.) Headaches—none • • •.

"Family History of hypertension: Mother—died 39 hypertension. Father died 61 heart attack and gout."

Defendant's Exhibit 20 is a letter dated November 22, 1950, from Dr. Kinzey to Harold Roosth reporting the results of the physical examination. It shows the opthalmoscopic report—eye grounds examination—to be normal (so

interpreted by all the doctors who testified). It shows the blood pressures to be above normal and that Harold reacted to the cold pressor test, but does not state that his condition is diagnosed as essential hypertension.

(Note—opthalmoscopic or eye grounds examination according to other testimony would be one of the first indication of essential hypertension and arteriosclerosis. This report negatives the idea of hypertension as a disease. R. 676, 327.)

Defendant's Exhibit 26 is a letter attached to which is a chloride test chart prepared by Harold and mailed to Dr. Kinzey. As interpreted by some of the doctors, witnesses in the case, this chart shows that Harold's sodium intake was two to seven grams per day.

[Note—The testimony shows that to control blood pressure the sodium (salt) intake must be less than 1 gram per day. R. 651, 676.]

Defendant's Exhibit 28 is a report by Dr. Kinzey to Dr. Arthur Ruskin (which according to Defendant's Exhibit 27, was also forwarded to Harold Roosth). The report shows that Harold had a "checkup" June 11, 1953. It showed (as interpreted by other witnesses at the trial) that the heart check was normal, the opthalmoscopic (eye grounds examination) was normal. The blood pressure of 148/138 was a mistake according to Dr. Kinzey and should have been 148 92. R. 213. It did not diagnose Harold's condition as essential hypertension.

[Note—According to Dr. Ruskin this blood pressure was not above normal (R. 666) though some other doctors disagreed.]

Defendant's Exhibit No. 44 is a letter from Dr. Ruskin to Harold Roosth dated September 10, 1953, reporting to him on the results of the above report from Massachusetts Memorial Hospital.

(Note—The letter is optimistic and encourages Harold in the belief that his condition is good, that he need have no cause for concern.)

Defendant's Exhibits Nos. 29, 30, 31, 32 and 33 are letters from Dr. Smithwick to Harold which, on their face, show that they are form letters of inquiry. Dr. Kinzey testified that it was Dr. Smithwick's habit to forward such letters to all patients in connection with his research work. R. 204. Each letter inquires what special treatment, if any, Harold is receiving for "your hypertension" and encloses a self-addressed postcard with a request that Harold fill it in and return it. Since they are form letters, we can see why there was no attempt to designate whether the "hypertension" was a disease form or only an elevation of blood pressure. Harold wrote at the bottom of Exhibit 22 that he had had no special treatment for "my hypertension" except continuation of salt free regime—although the evidence showed conclusively that Harold had never been on a salt free regime, only a low salt diet. He began a low salt diet after his heart attack in 1948, never salt free. R. 64-66. Mrs. Roosth said this was to lose weight. R. 70.

He returned two of the postcards, Defendant's Exhibit 7 dated , 1956, and Defendant's Exhibit 7A dated January 24, 1957. The 1957 postcard shows that he was on a salt poor diet and took "Raudixin 100 mgm b.i.d. (twice a day). The January 24, 1957, card reads:

> "General state of health excellent. Since my operation I have had the following additional treatment: Diet—low NA—low calory.
>
> "Drugs—dc (discontinue) Rauwolfia—due to weight gain. Remarks: b.p. runs 140-150 80-90. Weight got up to 214 — dieting & discontinuing drugs — weight (down) to 192. Still low calorie. Have you any suggestions? s Harold Roosth, M.D., 1025 Hospital Drive, Tyler, Texas."

(Note—The January 24, 1957, card showed that he had discontinued Rauwolfia due to weight gain, and that he must have discontinued long enough that he had already lost weight from 214 down to 192 lbs. He diagnoses his own general state of health as "excellent." This is the statement of Harold Roosth nearest in point of time to his application for insurance and shows that he believed he was in good health at the time.)

Defendant's Exhibit 25 and Plaintiff's Exhibit No. 2 were opthalmoscopic (eye grounds) examination in November 15, 1951, at the Massachusetts Memorial Hospitals which, according to all medical testimony, showed a normal condition.

(Note—In this examination the arteries of the retina are viewed and is an early way of diagnosing any hypertension disease and arteriosclerosis.)

Defendant's Exhibits 4, 5 and 6 are letters written by him to Dr. Dera Kinzey.

(Note—They reflect that Harold was given to worry, but not much else definite is shown by them.)

Plaintiff's Exhibit No. 6 is the death certificate of Celia Roosth, mother of Harold Roosth, shows that she died May 2, 1928 of "heart block and chronic nephritis."

(Note—Heart block was defined by Dr. Wiley Roosth as a condition where the heart beat slows from a normal of about 80 beats per minute to 30-40 beats to a point where it does not sustain life. This might be caused by nephritis, and nephritis may be caused by a toxemia of pregnancy, or which might go on after the childbirth is over. R. 534.)

Plaintiff's Exhibit 5 was several pages taken from the Lincoln National Life Insurance Manual written for the guidance of the company in issuing policies on persons who had physical disabilities. The pages concerned "blood pressure abnormal." The most material part is on the second page which reads:

> "History three to five years ago—if highest systolic in history three to five years ago was less than 170 and highest diastolic less than 106, disregard.
>
> "History over five years ago—usually disregard."
>
> (Note—Although Dr. Scoins testified this did not apply where the insured also had a history of a heart attack, yet it is evidence on the question of good health, materiality to the risk and reliance. Harold's pressure was never above these limits except in 1950, more than 5 years prior.)

REVIEW OF OTHER MATERIAL EVIDENCE

Rosa Lee Roosth, Plaintiff, a witness in her own behalf. Harold died February 7, 1957, at the end of the day after all patients had gone. R. 45. There had been no disturbance or excitement. R. 46. He had a heart attack in August 1948, but had gradually come back to a full day's work and had made no complaint of illness for four to five months prior to his death. R. 51. Harold and his brother, Dr. Wiley Roosth, had completed plans for a new clinic building in April or May, 1956, and had moved in November 1956. R. 52-53. Edwards (the insurance agent) approached Harold to sell him the insurance. R. 53-54. Prior to his death, Harold was accustomed to swimming, mowing the yard (R. 55), fishing and making night calls (R. 56), active at selling Christmas trees for the Optimist Club (R. 57), active in PTA, went to football games, drove all vacation trips. (R. 58.) Never complained of illness except in 1948 heart attack. Planned for his son to practice medicine with him. R. 60. Accompanied Harold on his last trip to Boston (1953). R. 61. After this checkup, Harold told her that everything checked out fine. R. 62-63. No complaints of headaches. R. 64. Began a low salt diet after his heart attack in 1948. R. 65-66. Food at home was prepared without salt, but he ate out and when he did, had salt in his dishes—not salt free. R. 65. Never complained of pounding in the head. R. 66. She didn't know he had hypertension or high blood pressure, because he never mentioned it. R. 69. The low salt diet was to lose weight. R. 70.

Charles E. Edwards, Witness for the Defendant. General agent for John Hancock Life Insurance Company. Called on Harold Roosth at the suggestion of Sol Edelman. R. 106. Harold wanted mortgage cancellation insurance to cover the cost of constructing the new clinic. R. 107. Original application for $26,000. R. 108. Called on him seven or eight times. R. 108. He recommended Lincoln because of the prior heart attack and Harold was a sub-standard risk. It was Edwards' idea to increase the policy to $50,000 and Harold agreed to it. R. 121. Saw Harold at 3:00 P. M. the day of his death (Harold was his doctor). R. 114. Harold was friendly and his appearance was good; no stress or strain. R. 115. No flushed face and Harold did not complain of his physical condition. R. 116. Harold was rated Table F (Table 6) as a sub-standard risk due to his prior heart attack. R. 120. This increased the annual premium from $1200 to about $1800. R. 121.

M. S. Bennett, a Witness for Defendant. General agent for Lincoln National Life Insurance Company. Edwards told him that the increase from $26,000 to $50,000 was at Edwards' suggestion and he sold Roosth on the increase. R. 130. Lincoln is a leader in the sub-standard insurance business. R. 132.

Dr. Armand Harold Horowitz (by deposition). Intern at Massachusetts Memorial Hospitals June 1st, 1950 through June 1951. Harold was a patient of that hospital and I examined him. R. 189. Took his personal history statement and family history. R. 190-191. This is Defendant's Exhibit 17, is in my handwriting. R. 197.

Dr. Dera Kinzey (by deposition), a Witness for Defendant. On each of Harold's visits (1950, 1951, 1953) he came with his brother "and the primary concern was his brother." R. 207. November 15, 1950, Harold came with his brother who was extremely ill. R. 213. Harold had intermittent type of essential hypertension. R. 227. When we can't classify the type or specific cause of hypertension, we call it essential. It means high blood pressure from a cause not known. R. 226. Harold's brother had an operation—splanchnicectomy. Harold was taking dicoumarol. R. 233. Raqualfia drugs are partly sedative and lower the blood pressure a little bit. Didn't tell Harold to take Rauwiloid (Rauwolfia). R. 267. "He felt that he was under a strain and he felt if he took off weight he would be all right." R. 268. Some times Raudixon is taken for nervous hypertension, but does not control sever hypertension. R. 270. Intermittent hypertension is where the blood pressure may be normal, but under stress and strain it goes up. R. 276. Sympathectomy is a surgical operation. R. 281. Referring to Defendant's Exhibit 34, a memorandum by Dr. Kinzie which contains "Imp. Bi-lateral Peet could be considered, but apparently he is getting along well on present regime. Rx: (1) Try Rauwiloid ½ b.i.d. and in b=d (2) Continue diet." R. 267. Bi-lateral Peet is one of the smallest lease extensive operations. R. 269. I never recommended it. R. 269. To my remembrance we never mentioned to Harold the advisability of having a sympathectomy. R. 286. The only drug Harold ever indicated he was taking from the post cards, Defendant's Exhibits 7 and 7A, was Raudixon.

It is very mild. Some doctors prescribe it as a sedative. He may have been taking it for that. I don't know. R. 270. Hypertension runs in families. R. 287. A person with hypertension would be subject to death from (1) cardiac, (2) hemorrhage, (3) kidneys. R. 289. That is sustained hypertension, although intermittent hypertensives can get in trouble. R. 290. Subarachnoid hemorrhage is not usually associated with hypertension, rather it is caused from a congenital weak spot—an aneurysm. R. 291. Everyone has some form of arteriosclerosis. R. 292.

Dr. Jas. P. Mullowney, a Witness for the Defendant. The pathologist who performed the autopsy. Defendant's Exhibit 35 is the autopsy report. R. 308. Found a hemorrhage in the subarachnoid area. R. 310-11. There are four layers covering the brain, outside is the dura, second is the arachnoid, hird the subarachnoid, fourth to pia. The hemorrhage occurred in the space between the arachnoid and subarachnoid (R. 311-12) with the greatest concentration of blood at the base of the brain (R. 313) at the bifurcation of the basilar artery which I assumed to be the point of the break. R. 315. Looked for but could not find an aneurysm; this does not mean there was none. He suffered a massive hemorrhage of explosive effect which could have completely destroyed the aneurysm. R. 316. Aneurysm is far and away the most frequent cause of subarachnoid hemorrhage. R. 317. Found arteriosclerotic change in the blood bessels. R. 318. Thickening of the arterioles. R. 318-20. Found atheramateous plaques. R. 323. Such plaques are common in people over forty; one in perfect health may

have them. R. 327. Earliest changes in the arteries are recognized in the arteries of the eye by an opthalmologist, referred to as an eye grounds examination. R. 327. Harold took dicoumarol. R. 332. Heart patients take it to slow the clotting of the blood. R. 334. Prothrombin tests are necessary. R. 335. May get out of control from day to day—the blood loses the capacity to clot and hemorrhages may occur in any part of the body. R. 336. Hemorrhage caused by high blood pressure will usually be in the brain itself. R. 342. The commonest cause of subarachnoid hemorrhage is a weakness in the vessel wall. R. 343. Eye grounds examination in 1950, 1951 and 1953 might show little sclerotic changes which might be increased by 1956. R. 345. Hypertension may but does not necessarily accelerate this change. R. 346.

Dr. Arthur Grollman, Witness for Defendant (who never knew Harold Roosth during his lifetime and testified entirely on hypothetical questions and the autopsy report.) "Hypertension" loosely means high blood pressure, but in a more specific sense, means a disease. R. 353. Treatments consist of salt deprivation, Rauwolfia drugs, rest and avoidance of stress and strain. R. 357. There is a family tendency to essential hypertension. R. 358. The hazards of the disease are the heart, hemorrhage and kidneys, in that order. R. 359. Harold's hypertensive condition makes his heart attack history more significant. R. 360. Raudixon is a Rauwolfia drug commonly used to bring blood pressure down somewhat. I am not impressed with the drug except it is a good tranquillizer. R. 364. And any tranquillizer

will lower blood pressure. Hypertension seems to accelerate hardening of the arteries, and a thickening of the arterioles is a reflection of the presence of hypertension disease. R. 366. Hypertension as a disease is calculated to shorten the life span. R. 368. It probably contributed to the cause of Harold's death, and it was actually the primary cause. R. 368. Atheramateous plaques in the vessels shown by Dr. Mullowney's report plus hypertension caused the hemorrhage. R. 370. I assume the absence of an aneurysm because Dr. Mullowney's report did not shown one. Hypertension probably contributed to the development of the underlying atheramateous. R. 371. Dicoumarol could not cause the hemorrhage, but it might make it more destructive in effect. R. 372. Hypertension affected the general soundness of his health. R. 372. In response to a long hypothetical question reviewing certain of Harold Roosth' records, he answers that Harold Roosth' cerebral hemorrhage was caused by his hypertension. R. 373-375. Cold pressor test is not generally used—I don't use it personally. R. 376. Most doctors do not use sympathetic operations. R. 377. Sustained hypertension is the most dangerous. R. 379. Anxiety, worry or tension may cause an increased blood pressure, in some persons greater than in others, depending upon the extent of the anxiety. R. 380. Harold's anxiety over his brother Bennie's condition may have caused a temporary elevation of blood pressure, but doubt if it would continue for days and weeks; not certain whether it could continue for three days (referring to the 1950 examination). R. 382. A normal tensive person may be a reactor to the cold pressor test. R. 384. Harold's favorable reaction to the

sodium amytal test does not prove he was not hypertensive, though it is a favorable test. R. 384. Referring to Harold's blood pressures during the year 1949, which was never shown to be above 160/90, witness says he would have to examine the individual to judge and interpret the readings. R. 387-88. Referring to a Massachusetts Memorial Hospital chart November 1950 which shows Harold's pulse rate was normal, he says that this is favorable, but not of great significance. R. 392. Referring to Defendant's Exhibits 7A and 7 (the post cards), they indicate that his pressure was lower with Rauwolfia discontinued than while he was taking Rauwolfia. R. 394. Blood pressures of 150/90 at 33 years of age (Dr. Muntz reading in 1949) is on the order of abnormality, but I would have to take other things into consideration. R. 402. Just on the limits of abnormal. R. 403. In my opinion Harold had hypertension in November and December 1956, and it contributed to bringing about his death. R. 406. I am strongly influenced by the post-mortem, without which I would be most questionable about a lot of things I have said; taking into consideration the outcome, he was not in good health November and December 1956. R. 407. The eye grounds examination is not as reliable in reflecting true conditions of blood pressure as cutting into the vessels and examining them microscopically (autopsy). R. 408. Interpreting Defendant's Exhibits 7 and 7A, the post cards sent by Harold to Dr. Smithwick, they are to be interpreted to indicate that Harold discontinued Rauwolfia due to weight gain, and that he had gone down from 214 to 192 pounds after discontinuing it. R.

410-411. The doctor who actually takes the blood pressure is in a better position to judge its significance. R. 412. My testimony is colored by the autopsy upon which I rely most strongly. R. 412.

Kenneth A. Balay, Witness for Defendant, Underwriter for Lincoln National Life Insurance Company. Had letter from Dr. Ruskin to Dr. Ghent Graves dated February, 1955, Defendant's Exhibit 37 (R. 431), which did not indicate to me that Harold had been in Massachusetts Memorial Hospitals for treatment concerning hypertension. R. 436. Plaintiff's Exhibit 5, Lincoln National's Manual on high blood pressure which states that pressures under 170 106 during the period three to five years prior may be disregarded. R. 478. During this period I do not know that Harold's pressure was ever above 170 106. R. 479. There is no inquiry in the manual about pressures more than five years prior. R. 479. I knew from Dr. Ruskin's letter (Defendant's Exhibit No. 37) that Harold had X-ray and electrocardiogram or blood studies at Massachusetts Memorial Hospital, but didn't feel it was necessary to investigate it further. R. 480. If I had known Harold had headaches, I might have made additional investigations of his blood pressure and other things. R. 483. Rated Harold Table F (Table 6). This increased the policy premium from $1094 to $1922. Lincoln makes a practice of taking sub-standard risks—those who are not in good health. R. 487. Lincoln's manual concerning blood pressures are without consideration of other ailments. R. 493. Blood pressure taken in connection with a prior heart attack is more serious. R. 494.

Dr. William A. Scoins, Witness for Defendant, Chief Medical Director for Lincoln National Life Insurance Company. We accept the applications as true to appraise the risk. R. 498. Would not have considered Harold if we had known he had hypertension in addition to a heart attack. R. 499. First time we knew Harold had been a patient at Massachusetts Memorial Hospital for hypertension was after his death. R. 501. I had no knowledge at the time of Harold's application that he had been to Smithwick Foundation or was on a salt restricted diet. R. 502. Salt restricted diet is because of dropsy, decompensation or hypertension. R. 503. A heart patient with hypertension added is much greater risk. R. 512. A long hypothetical question was then asked based upon suppositions of Harold's record with the answer that he would have been rejected had the witness known these facts. R. 515.

Dr. Wiley Roosth, a Witness for Plaintiff, a brother of Harold Roosth. Finished clinic building in 1956 after a year's planning. Harold started to buy mortgage insurance and ended buying life insurance, increasing it from $26,000 to $50,000 or $100,000 R. 520-521. Harold did full day's work for last two years of his life and never told me he had hypertension. From my contact with him, I would say he did not. R. 525. Occasional high blood pressure can happen to anyone in times of stress. True hypertension is a persistently high blood pressure—goes up and stays up. R. 526. Bennie Roosth had severe hypertension in 1950—had affected his heart and kidneys. R. 527. Harold was his doctor and decided to take him to Dr. Smithwick at Massachusetts

Memorial Hospital; it was Harold's decision whether Bennie should have the serious operation, the most extensive sympathetic operation Dr. Smithwick did. R. 529. They had to postpone the operation because his kidneys were not good enough to stand it. The strain on Harold was enough to cause anybody's blood pressure to rise. R. 530. Harold never complained of high blood pressure or headaches. R. 531. Our family history was that our mother had died of a kidney condition resulting from childbirth. R. 532. Plaintiff's Exhibit No. 6—death certificate for mother—shows she died of heart block and chronic nephrities. Nephrities is a kidney ailment which might result from childbirth and in turn cause heart block—a too slow beat of the heart, insufficient to sustain life. R. 533. There is no family history that mother died from hypertension. R. 535. We considered that Bennie was the patient, not Harold, at Massachusetts Memorial Hospitals. R. 540. Harold did not tell me after his 1951 examination that he was pronounced subject to essential hypertension. R. 542. After his 1953 examination he told me they were pleased with his condition, that nothing was wrong with him in particular. R. 543-544. I took Harold's blood pressure on occasions and it was never high. R. 552.

Dr. C. B. Young, a Witness for Plaintiff. Harold Roosth's doctor after 1949, after his heart attack. He consulted me at intervals, and I took his blood pressure three or four times and examined X-ray and electrocardiograms. R. 555. He probably discussed his condition with me. He was concerned about his heart only. Never mentioned hypertension. I do not believe he had hypertension. R. 556. Doctors dis-

agree on what hypertension really is and when a patient has it. R. 556. In my opinion, a person is not hypertensive until he has consistently known high blood pressure, even while asleep. When it goes up during excitement, but then goes down, it does not indicate hypertension. R. 557. Long standing hypertension affects the kidneys, the size of the heart, affects the electrocardiogram and the vessels in the eye. If the eye grounds examination was normal in 1950, 1951 and 1953, it would indicate he did not have hypertension or even highblood pressure; it shows up fairly early in the eye grounds. R. 558. Harold's worry over Bennie's serious condition was sufficient to cause his blood pressure to be elevated — he was an intense individual. R. 560. The pressures which he had while at the Boston hospital in 1950 could have been caused by worry over Bennie. R. 560. Each person has his own normal pressure; what is normal for one person may not be normal for another. R. 562. After reviewing Harold's pressures and his 1951 examination at Boston, says that they are normal, and the same with reference to his 1953 pressures at the Boston examination. R. 563. Took Harold's pressure about a week before his death. If it had been above normal, I would have recalled it. R. 565-6. From what I know of Harold, I could not diagnose him as subject to hypertension. R. 564. I argued with Harold about prolonged dicoumarol treatment. R. 560. There is danger from the possibility of hemorrhage. R. 567. In my conferences with Harold he never said anything to indicate he believed he had hypertension. R. 568. Harold was being sold insurance, and I advised him to go ahead and take it. R. 571. I examined

Harold for his Lincoln National policy. I wrote the answers and Harold signed it. R. 578-79. I also examined him for the American General Life Insurance Company at about the same time. R. 582. Harold never told me that he was on a salt restricted diet. R. 585. Salt restriction helps control hypertension. R. 586.

Dr. Haskell Muntz, a Witness for Plaintiff. I treated Harold for his heart attack in 1948 (R. 591), and prescribed dicoumarol treatment, though I have no knowledge how long Harold continued the treatment. R. 595-6. Refers to blood pressures taken in 1949, all of which are below 160 90. R. 596. Made an opthalmoscopic examination which did not show hypertensive or sclerotic changes. R. 597. Pressures I found in 1949 are not above normal; not considered hypertensive. R. 601. The danger from dicoumarol treatment is that the prothrombin time will get out of control and cause hemorrhages. Had one patient who had a hemorrhage under the tongue. R. 604. May cause cerebral and subarachnoid hemorrhages. R. 604. Another patient on this treatment vomited blood, all caused by sudden change in prothrombin levels. May have a hemorrhage in the lungs. If the hemorrhage happens where we can get to it, we can stop it, but not if it is in the skull. R. 605. Prothrombin time can change without warning any day, although the dosage remains constant. R. 606. Blood pressure has nothing to do with the hemorrhagic phenomena caused by the prothrombin level. R. 607. Subarachnoid hemorrhages usually are caused from aneurysms. R. 608. Assuming Harold's responsibility for Bennie at the time of his opera-

tion in 1950, this could have caused an elevation of blood pressure. R. 610. Normal persons frequently have episodes of hypertension associated with anxiety. R. 610. Referring to blood pressures which Harold had at his Boston examinations in 1950, 1951 and 1953, says that in his opinion Harold did not have hypertension and required no blood pressure treatment. R. 618-621. He may or may not later developed essential hypertension. R. 622. The cold pressor tests have fallen into disrepute. R. 623. Approximately 50 per cent of the reactors to this test never have hypertension. R. 623. When asked to define hypertension, he asked if the attorney means essential hypertension, then proceeds to define essential as a sustained high blood pressure, a disease. "Hypertension itself means elevated blood pressure." R. 624. Diastolic blood pressure above 90 is above the normal range. R. 630. Hypertension increases the chance of hemorrhage blowing out an atherosclerotic plaque or an aneurysm. R. 646. A berry aneurysm can rupture leaving no trace of its prior existence. R. 646-7. Harold might have had a berry aneurysm so small it was destroyed. R. 646. Refers to Defendant's Exhibit No. 26 showing that Harold was taking two to six grams of salt per day. This would not lower blood pressure. To get control, the salt intake must be less than a gram a day. R. 651-2. Refers to Defendant's Exhibit 3, a retail credit investigator's report signed by Dr. Muntz referring to Harold Roosth's "mild hypertension" and pressures which were under 90, within the normal range. R. 654. Mild hypertension is not essential hypertension. R. 657.

Dr. Arthur Ruskin, a Witness for Plaintiff, one of Harold's doctors. Complete physical examination made of Harold December 2, 1949. R. 660. No heart enlargement and the eye grounds were normal. No indication of hypertension. R. 661. But I did recommend dicoumarol treatment to prevent recurrence of a heart attack. There is danger that the prothrombin time will get off, which could cause bleeding or a cerebral hemorrhage. R. 663. Our last conversation was by telephone in November or December, 1956, about his heart, but without any mention of high blood pressure. R. 664. His pressure December 1952—140 90—and April 1954 130 85 was normal. R. 665. In my opinion diastolic pressure below 100 is normal. Doctors disagree. Some feel that a person's between 30 and 35 should be below diastolic 90. R. 666. Pressures consistently above 100 or 110 are potentially dangerous. R. 667. Refers to Defendant's Exhibit 37, the letter from Ruskin to American General, 1943 is a typographical error, should be 1953. Where it says Report from Massachusetts Memorial Hospitals noted essentially the same findings and E. K. G., this refers to approximately the same blood pressure. R. 670. Referring to Harold's pressure November 1950 at the Boston hospital and to his responsibility to Bennie Roosth's dangerous operation, says that the stress could have accounted for Harold's elevated pressures. R. 672. The sodium amytal test at this time is perfectly normal. The pressures shown by his 1951 examination at Boston are normal and his 1953 examination at Boston shows normal pressures. R. 673. The pressures taken by Dr. Muntz in 1949 were normal. The eye grounds test in 1950, 1951 and 1953 at

Boston are normal, and indicate that true hypertension was not present. The eye grounds is the most delicate indication showing the state of the arterioles. R. 676. Salt restriction in the diet to a half a gram a day controls pressure, but greater portions of salt do not. R. 676. Rauwolfia series drugs are mild sedatives and depressants of blood pressures used in the early stages of essential hypertension and drop the blood pressure relatively little. There are blocking drugs with much more severe effect. R. 678. Referring to the post cards—Defendant's Exhibits 7 and 7A—written by Harold Roosth to Dr. Smithwick show Raudixon (Rauwolfia) was doing very little good. R. 678-9. I never advised Harold he had hypertension of the essential type (R. 679), and in my opinion, he did not have. R. 680. I don't think he ever had essential hypertension. R. 681. Atheramatous plaques are fat deposits in the blood vessels. R. 682. They are often found in very young persons and increase with the aging process. R. 682. Can occur independent of hypertension. R. 682. I disagree with Dr. Grollman's diagnosis that Harold was definitely afflicted with hypertension; and with Dr. Kinzey. R. 696. When Harold referred to his own hypertension (in correspondence referred to by the attorney), "I suppose he meant high blood pressure, which is not the same thing." R. 696. Blood pressure such as Harold had would hardly decrease his life span, considering his heart attack. If he had sustained hypertension, it would. R. 703. The diastolic pressure should be from 110 to 130, consistently to indicate hypertension. Such a mild restriction of salt would be ineffective to reduce blood pressure. R. 705. Hypertension is just a term

meaning high blood pressure — arteriole blood pressure. R. 706.

SUMMARY OF EVIDENCE FAVORABLE TO PLAINTIFF ON ISSUES WHICH SHOULD HAVE BEEN SUBMITTED

A. GOOD HEALTH: The eye grounds examinations of Harold were normal in 1950, 1951 and 1953. The heart size was normal at all these times (essential hypertension leads to enlargement of the heart). Mrs. Roosth and Dr. Wiley Roosth said Harold lead a normal life, did a full day's work for two years prior to his death, and had an appearance of good health. Dr. Grollman said one of the treatments for elevated blood pressure was avoidance of stress and strain (R. 357), but Harold did not avoid it. In order to control blood pressure by reduction of salt or sodium, it must be below one gram per day according to Dr. Ruskin (R. 676) and below a half gram according to Dr. Muntz. R. 651-2. The record is conclusive that Harold never reduced his salt except within the range of two to six grams per day (Defendant's Exhibit No. 26), and according to Mrs. Roosth, this was done to lose weight. R. 70. Doctors Young, Ruskin and Muntz believed Harold was in good health except for his prior heart attack. Dr. Kinzey's diagnosis of essential hypertension was likely based on the cold pressor test, a test which Dr. Grollman and Dr. Muntz agreed was not currently used and was in disrepute. R. 376-623.

B. ABSENCE OF FRAUDULENT INTENT: Harold never expressed an opinion to his wife or to Doctors Muntz, Young or Ruskin that he believed himself to be in ill health except for the concern about the history of the prior heart attack. (In *World Insurance Company v. Pipes, 5 C. C. A. La., 255 Fed. 2d 465*, it was a matter of importance that the insured had not told his wife or close friends that he had Bright's disease as opposed to the insurance company claim that he knew he had the condition.) None of the doctors ever advised him that, in their opinion, he had essential hypertension. Dr. Smithwick's letters of inquiry referring to "your hypertension" were form letters apparently addressed to all patients and did not distinguish between hypertension in the form of a disease and a simple elevation of blood pressure. Harold told his wife after the 1953 checkup that they found him to be O.K. R. 62-3. Dr. Ruskin, in his letter to Harold on September 10, 1953, Defendant's Exhibit 44, encouraged him to believe that he was in good health and had no reason for concern. Harold's initial application was for $26,000 mortgage cancellation life insurance. Edwards, the life insurance salesman, induced him to increase it to $50,000, which negatives the idea that Harold originally embarked upon a fraudulent scheme. R. 121. The post cards (Defendant's Exhibit 7A) dated January 24, 1957, indicates that Harold believed that the general state of his health was "excellent."

C. MATERIALITY AND RELIANCE: Plaintiff's Exhibit 5, the excerpt from Lincoln's manual, indicates that

blood pressures five years prior are to be disregarded and that blood pressures under 170/106 during the interval from three to five years prior are to be disregarded. The only time Harold's pressure was above normal, according to Dr. Ruskin, was in 1950, and his pressure was never above 170/106 during the five-year period. Lincoln was a leader in issuing policies on sub-standard risks. R. 487. Dr. Ruskin's letter to American General Life Insurance Company, which admittedly was in the possession of Lincoln at all material times, clearly gave notice that Harold had been examined at Massachusetts Memorial Hospitals, and although it stated the date as June, 1943, the letter shows on its face that this was a mistake because the examination was after his 1948 heart attack. Mr. Balay, the Lincoln underwriter, although he knew of Harold's prior X-rays, electrocardiograms or blood studies at Massachusetts Memorial Hospitals from Dr. Ruskin's letter (R. 480), said he did not care to have the full particulars.

D. RAUDIXON: According to the post card, Defendant's Exhibit 7, Harold took Raudixon, a Rauwolfia drug, at some time in 1956. Dr. Grollman says it is a good tranquillizer, but is not impressed with it for hypertension (R. 364); that Harold's pressure was lower after he discontinued Raudixon in 1957 than it was while he was taking it. R. 394. Dr. Kinzey says the drug is sometimes used as a sedative. R. 270. After Harold had discontinued the drug, in January 1957 he felt himself to be in excellent health. (Post card—Defendant's Exhibit No. 7A.)

E. CAUSE OF DEATH: Dr. Muntz explained the dangers of prolonged dicoumarol treatment and said that in his opinion, this was probably the cause, that a hemorrhage could result from dicoumarol poisoning without any high blood pressure. Dr. Mullowney expressed a similar view. All doctors agreed that dicoumarol is a dangerous drug. Death might be caused by this drug as well as by essential hypertension as suggested by certain doctors.

F. DEATH OF HAROLD'S MOTHER: The testimony relied upon by the Defendant was taken from the records of the Massachusetts Memorial Hospitals showing that the cause of her death was hypertension or cardiovascular accident. Opposed to this is the death certificate, Plaintiff's Exhibit 6, which shows heart block and chronic nephritis, which was explained by Dr. Wiley Roosth to possibly mean a kidney ailment developed after childbirth which caused heart block. There was the family history that Mrs. Roosth died from childbirth. These conflicting ideas presented jury questions. Coupled with this is the fact that Harold was of such tender age he could hardly have known what caused her death.

G. ESTOPPEL BASED UPON DR. RUSKIN'S LETTER: This letter is Defendant's Exhibit No. 37, dated February 24, 1955, written by Dr. Arthur Ruskin to American General Life Insurance Company which was then considering the issuance of a policy to Harold Roosth. This insurance was to be reinsured by American General with Lincoln National. In connection with the reinsurance file

Lincoln National was furnished with the letter, which reads as follows:

"February 24, 1955

American General Life Ins. Co.
P. O. Box 1931
Houston, 1, Texas
Attn.: Dr. Ghent Graves, Medical Director

Dear Dr. Graves:

Dr. Roosth has been under my care since December 2, 1949, at which time the second ECG sent you was taken. He had a myocardial infarction in August 1948; was treated in Tyler and recovered uneventfully. At that time G.I. series, gall bladder series, barium enema, all negative. I have seen him frequently until June 1954. During all this time he has never had any symptoms and his physical examination, including size of heart fluoroscopy of the heart have always been negative except for blood pressure findings—highest on December 2, 1949, 150 100, but always since then below 140 90. He has taken excellent care of himself, including prolonged anticoagulant therapy under my direction. Report from Massachusetts Memorial Hospital on June 1943 noted essentially the same findings and ECG (Q2 and Q3). Urinalysis, blood count and sedimentation rates all normal. Prompt return of ECGs will be appreciated.

With best wishes,

Sincerely yours,

/s Arthur Ruskin, M.D.
Arthur Ruskin, M.D.
Assoc. Prof. Int. Med.
Univ. of Tex. Med. Br.
Galveston, Texas"

It is apparent from an analysis of the letter that the date of the Massachusetts Memorial Hospital report June *1943*

is in error, that the report must have been after the heart attack in 1948 because it refers to ECGs (electrocardiograms) as they reflect on the result of the heart attack. Dr. Ruskin said that it should have been 1953, but anyway, Lincoln was put on notice that the date should have been after 1948.

It is apparent that the Massachusetts Memorial Hospital examination extended to blood pressure examinations. Mr. Balay, the Lincoln underwriter, acknowledged that he learned from the letter that Harold had had blood studies in Massachusetts Memorial Hospital, but did not feel that further inquiry was necessary. R. 480. It is well established that where a life insurance company issues a policy with knowledge that certain misrepresentations have been made in the application that it waives or is estopped to rely upon the misrepresentations as a means of avoiding a policy. *Union Assurance Soc. v. Toliver (5 C. C. A.), F. 2d 405, 408; Perry v. Citizens Life (C. C. A.), 163 S. W. 2d 743, 747; Baker v. Ft. Worth Mutual Benefit Assn. (Com. App.), 280 S. W. 165; Terry v. Prudential (C. C. A.), 77 S. W. 2d 761; American Fire & Casualty Co. v. Eastham (5 C. C. A.), 185 F. 2d 729.*

In their Petition for Certiorari and supporting brief Petitioners indulge in the assumption that Harold had essential hypertension and then charges him with concealing it. "Much saying" is their substitute for the conclusive proof the law requires to take the case from the jury.

If Harold was not in "good health" as that term is analyzed in *Texas Prudential Ins. Co. v. Dillard (S. Ct.),*

307 S. W. 2d 242, then fraud and deceit become moot. We submit that "good health" is a jury question in view of the conflicting testimony of the doctors and the ambiguous or conflicting statements of Harold himself. If the Court agrees that Petitioner's arguments on misrepresentation and fraud are based on not conclusive evidence of bad health, they fail to justify taking the case from the jury.

Petitioner disregards the testimony of Dr. Young, Dr. Muntz and Dr. Ruskin that Harold did not have essential hypertension or hypertension as a disease, but simply an elevation of blood pressure in 1950 due to the stress and strain under which he was laboring when Bennie was being operated.

Petitioner disregards the explanation of Harold's correspondence with Dr. Kinzey and Dr. Smithwick where he refers to "my hypertension" as meaning an elevation of blood pressure, not the disease. The explanation is that "hypertension" may mean only an elevation of blood pressure which is not a disease, or it may mean a disease. See testimony of Dr. Grollman (R. 353), Dr. Muntz (R. 624), Dr. Ruskin (R. 706). Dr. Muntz said,

> "Normal persons frequently have episodes of hypertension associated with anxiety." (R. 611.)

In stating that Harold admitted he had the disease, Petitioner disregards Dr. Kinzey's testimony (the doctor upon whom they rely to establish that Harold had intermittent essential hypertension) where she says,

> "He felt that he was under a strain and he felt if he took off weight, he would be all right." (R. 268.)

They say essential hypertension is a disease without possibility of recovery, that Harold being a competent doctor must have known this. Does this statement indicate such a belief? Rather, it fits our explanation that the only time he believed his blood pressure was above normal was when he was under strain, a condition which he could correct. This does not sound like conviction that he had an incurable disease which would be particularly dangerous considering his prior heart attack.

They disregard the testimony of Dr. Ruskin, who said Harold did not have the disease. He said:

> "Q. And with reference to a person of Harold's age, what do you consider to be the normal range of pressures?
>
> "A. I personally, and many other authorities, consider any diastolic pressures below a 100 as normal. Diastolic pressure of 110 and above would definitely be above normal." (R. 466.)

They disregard their own star witness, Dr. Grollman, where he says:

> "Q. You have referred to normal pressure, there is really no such thing that you can pick out any individual and say that his normal pressure is so much and if he is over that, he is above normal and if he is below it, he is subnormal, isn't that true, doctor?
>
> "A. Strictly speaking, that is true, sir. There is a biological variation.
>
> "Q. What is normal for one person may not be normal for another person?
>
> "A. Within, considering the circumstances, that is why you have to—

"Q. Well, you have to consider the person as an individual and not judge him by some statistics that have been made up by some doctor on a thousand people?

"A. Right." (R. 414.)

They disregard their own manual where it says to disregard pressures under 170/106. Plaintiff's Exhibit 5.

If one thing was proven with certainty during the trial of this case, it is that the doctors have different opinions as to what is a normal blood pressure.

Dr. Grollman's testimony that death was caused by hypertension plus atheromatous plaques (R. 310) was based on his assumption that there was no rupture of an aneurysm (a congenital defect). Dr. Grollman says that death was not caused by ruptured aneurysm because the autopsy report prepared by Dr. Mullowney shows that Dr. Mullowney did not find an aneurysm (R. 370). Yet Dr. Mullowney, when he testified on the witness stand, said that the hemorrhage was of such magnitude that it might have exploded the neurysm leaving no trace of its prior existence; that the fact that he did not find an aneurysm did not prove there was none (R. 316).

The low salt diet which Harold followed, they say, conclusively shows that he was treating himself for essential hypertension. This entirely disregards the testimony of Doctor Muntz (R. 651) and Dr. Ruskin (R. 676) that salt restriction in the diet does not have any effect of lowering the blood pressure unless the salt intake is reduced to below one gram or one-half gram per day; disregards Dr. Groll-

man's testimony that salt restriction must be "strict" if it is to lower blood pressure (R. 358). Disregards the testimony of Mrs. Roosth that Harold started a low salt diet after his heart attack in order to reduce weight (R. 65-66, 70). The evidence conclusively shows that the only reduction of salt in his diet was down to two or six grams per day (R. 651); not sufficient to control blood pressure. Again, Harold being a doctor would have lowered his salt to the extent necessary to lower blood pressure if that was his purpose.

They say that Harold knew his mother had died from cerebral vascular accident or hypertension, relying upon statements in exhibits from the files of Massachusetts Memorial Hospitals. They refer to the paper styled Preoperative History (R. 227-228) copied in Appellee's Brief, p. 12, where it says:

FAMILY HISTORY OF HYPERTENSION

MOTHER	FATHER
Died 39	Died 61
Hypertension	Heart Attack and Gout

PATIENT
DR. H. ROOSTH

This does not say that his mother died of hypertension any more than that his father died of gout, merely that they had it. No one ever died of gout. Defendant's Exhibit

17—the personal history statement taken by Dr. Horowitz —contains the statement:

"Mother died at 39 of cerebral vascular accident."

This does not say she had hypertension, disease or otherwise. It is hardly consistent with the death certificate which shows she died from "heart block and chronic nephritis"—Plaintiff's Exhibit 6. Nor is it consistent with the testimony of Dr. Wiley Roosth that the family history of the Roosth family was that his mother had died as a result of childbirth, that chronic nephritis might result from childbirth and that heart block might develop from chronic nephritis. Such evidence is hardly the conclusive testimony necessary to support an instructed verdict.

Mr. Balay, the underwriter, would not say the policy would have been denied if he had believed Harold's mother had a cardiovascular accident.

"Q. Do you suggest that you would have denied this policy if you had information that this man's mother had some form of cardiovascular trouble?

"A. No, sir, not necessarily.

"Q. But do—you do make such allegations in the answer, do you not?

"A. I don't know.

"Q. Generally to that effect?

"A. I don't know. I have never made any statement about that at all." (R. 483.)

They say they would not have issued the policy if they had known that Harold had been a patient of the Smithwick group or Medical Associates, but they were willing to

disregard knowledge that he had been a patient at Massachusetts Memorial Hospitals which made findings as to his heart and blood pressure. Apparently referring to Dr. Ruskin's letter (Defendant's Exhibit 7), Mr. Balay said:

> "Q. Then, I will ask you this question: did you know at the time this application was being considered by you or at the time you acted on the application in behalf of the Lincoln National Life Insurance Company that Dr. Harold Roosth had been in fact in the Massachusetts Memorial Hospital for observation treatment the years in November, 1950, did you know that at the time you were acting on this application?
>
> "A. There was an indication in the file that he may have been in the Massachusetts hospital in 1950, but I didn't know that he was." (R. 428.)
>
> "Q. You stated a moment ago that you had some information to the effect that while you were examining this application that Dr. Roosth had been to the Massachusetts Memorial Hospital previously at some time and I will ask you what was the source of that information?
>
> "A. The source of that information was a letter written to the American General Life Insurance Company.
>
> "Q. Was it a letter or a copy of a letter?
>
> "A. It is a photostatic copy of a letter written to American General Life Insurance Company February 24, 1955, and signed by Arthur Ruskin, M.D." (R. 429.)

It comes to mind that the insurance company witness considers "material to the risk" differently after the insured is dead, that matters first thought immaterial now are all important.

AUTHORITIES CITED BY PETITIONER— FEDERAL CASES DEALING WITH NATIONAL SERVICE LIFE INSURANCE POLICIES

These are the cases which are relied upon primarily by the insurance company. They deal with Federal law. They all arise where a policy of National Service Life Insurance, after lapsing, is reinstated upon the application of the insured in which he makes misrepresentations of fact concerning his health and medical treatment. It is necessary where misrepresentations are proven, to establish that they are material to the risk and were made with the intent to deceive the Government, quite similar to the requirements of the Texas law. In practice, however, the Federal law has been more strict in holding that materiality and intent to deceive become law questions. Whereas the Texas courts in Texas cases have required proof that there was an actual conscious intent to deceive, and this intent will not be drawn as a matter of law from the fact that the misrepresentation was knowingly and intentionally made.

In discussing these cases, however, we note that the facts in our case are such that even under the Federal law, it would still be a fact question whether the alleged misrepresentations were made with intent to deceive.

The leading case is *Pense v. United States, 316 U. S. 332, 86 L. A. 1510.* Pense's National Life Service policy lapsed in 1920 and was reinstated in 1927 based upon his application which represented that he had not been treated for throat, heart or stomach and had not consulted a doctor

since the policy lapsed. Actually, he had been examined in 1925. In 1928 he had applied for compensation because of chronic sinusitis ethmoidities atrophic rhinitis and myocardidis and had stated that a physician had treated him for these ailments. In 1931 and 1933 he applied for other benefits, stating that since 1918 his heart had been [illegible] and that he had the above disease from 1920 until 1925. The court held that the jury could disbelieve Dr. Glickman's testimony concerning Pense's ailments (presumably because it was an expert's opinion) but could not disbelieve that an examination had been made. From Plaintiff's admissions in the applications for compensation made in 1928, 1931 and 1933, the Court presumed as a matter of law that he had the intent to deceive in the absence of any subsequent denial or contradiction by the insured of his prior statements in the application of compensation. The dissenting opinion of Murphy, J. J., concurred in by Clark and Douglas was that the statement in the reinstatement application that Pense was in good health and other circumstances being in conflict with the applications for compensation created a fact question.

With reference to intent, the Court said:

> "From these facts, the requisite intent to defraud is presumed, and therefore need not be proven in the absence of *countervailing evidence*." (Emphasis ours.)

In our case countervailing evidence exists, evidence showing that Harold Roosth actually was not afflicted with any disease and actually believed himself to be in excellent health at the time he made the application.

McDaniel v. United States, 5 C. C. A. 196 F. 2d 291, was in line with the *Pense* case, a reinstatement of a National Service Life policy was involved. The representation was that he was in good health and had not been treated by doctors since the policy lapsed. It was stipulated that the answers were incorrect. The Plaintiff had been diagnosed as having Hodgkins disease for which he had X-ray therapy. The only issue was whether he had a fraudulent intent. He knew that he had a serious disease. There was no countervailing evidence that he was actually in good health or that he believed he was in good health as in our case. On the contrary, he had claimed disability benefits and had been rated 70% disabled. From this the Court presumed the intent to defraud as a matter of law.

United States v. Stratton, 5 C. C. A. 232 Fed. 2d 880, was a similar case and a similar result was reached. On the same day that he paid the premium for the reinstated policy, he had blacked out. The misrepresentations were made only a week before he was to have electroencephalogram examination for brain injury. The jury found for the insured, but the Court reversed and rendered. There were no countervailing circumstances to show actual good health or against the legal presumption of fraudulent intent. Nevertheless, there was a dissenting opinion by Justice Cameron that the trial judge and the jury were in a better position than the appellate judges to determine the state of mind of the insured on the question of fraudulent intent.

In *Cardwell v. United States, 5 C. C. A. 186 Fed. 2d 382*, the Court recognizes that the distinction exists from the

Pense case which we have mentioned. The reinstatement application of a National Service Life Policy contained misrepresentations concerning good health and consultation of doctors, the Court held that the question of fraudulent intent *was for the jury and not the Court;* because there were circumstances indicating the possibility of good faith. Referring to the *Pense* case, the Court observed that

> "His admissions left no room for conjecture as to the falsity of previous statements in the application for reinstatement and of his knowledge of such falsity and on the basis of these facts held that the requisite intent to defraud would be presumed and therefore need not be proven in the absence of countervailing evidence."

In some states, and in some Federal decisions, intent to deceive has been presumed as a matter of law from the fact that the misrepresentations were knowingly made by the insured, but such is not the law in Texas. Likewise materiality to the risk has been determined as a matter of law from the wording of the application, but not in Texas.

Equitable Life Insurance Company v. Alvarez (5 C. C. A.), Tex. 141 F. 2d 551, Opinion by Judge Hutcheson, is illustrative of the point. The application for insurance represented (1) that the insured had none of the illnesses referred to and (2) had not had X-ray examination. Actually, these were misrepresentations because he had X-ray examinations about six years before and a second set of X-ray examinations about a year later, which showed a tumor of the lungs. The insured was a medical student at the time of the examination. The tumor became malignant and apparently was the cause of his death. Held that under

the Texas law it was for the jury to decide (1) materiality to the risk, and (2) whether there was a willful design to defraud. The Court says that *Metropolitan Life Insurance Company v. Madden (5 C. C. A.), Fla., 117 F. 2d 446*, does not apply; that *Madden v. Metropolitan Life Insurance Company (5 C. C. A., Fla.), 138 F. 2d 708*, does apply, that the law of Florida, as announced in the latter case, is the same as the law in Texas and requires the submission of the case to the jury.

In order to show how closely analogous the *Alvarez* case is, we must analyze the two *Madden* decisions, actually the same case twice decided. Judge Hutcheson wrote both opinions.

In the first decision of the *Madden* case *(117 F. 2d 446)*, the Court reversed the jury decision for the Plaintiff and held that as a matter of law the misrepresentations were material and were made with intent to deceive. In the second decision, *138 F. 2d 708*, the court reversed itself and under the same facts held it was a fact question for the jury whether the representations were material and made with the intent to deceive.

The change of decision was because under State law materiality and fraudulent intent were not to be presumed from the Court's belief of materiality to the risk and that the answers were knowingly false. The misrepresentations were in answer to questions in the application (1) that the insured had no stomach ailments, (2) that he had not attended a hospital or been treated in five years. Actually, he had cardiospasm (a stomach ailment) and had been

treated for it. In the first decision, the court said, "the evidence as to both materiality and the falsity of the answer was conclusive. * * * it was material as a matter of law, and as here, the answer was, and was known to be, untrue, its giving prevented recovery on the policy without regard to whether the answer was given with a conscious fraudulent purpose to deceive." (451)

At the second trial, the trial judge instructed a verdict on the same evidence, but the Circuit Court sent it back for a jury trial because it found the State law required it. Referring to a State Court decision, the Court said:

> "In so ruling, the Florida Supreme Court, expressly rejected the distinction made in the Madden case, and accepted by most of the Courts in the country, between a statement of opinion as to whether the insured had suffered from particular ailments and of fact as to whether he had or had not consulted a physician. It was taking its place with courts which hold that, where a statute or policy, as here, provides that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury; and that (even though a question relates to matters of fact such as whether there was a consultation rather than of opinion as to whether insured was ill or suffering from a disease), unless the evidence admits of no other conclusions than that there was an intent to deceive, it is for the jury to determine whether the answer was fraudulent in fact, that is, made with intent to deceive or whether it was given in good faith, that is, without conscious intent to defraud. Since we are bound to follow where Florida courts lead in cases governed by Florida law, it is sufficient for us, with-

> out more, to determine, as we do, that, under Florida law, plaintiffs were entitled to go to the jury on the issue of intentional or conscious fraud; and that, as to all three of the policies, Florida law governs."

Clark v. National Life Insurance Company, Sup. Ct., 200 S. W. 2d 820, is a leading Texas case. A policy of life insurance was issued April 21, 1943, the insured died February 26, 1945. The defense was that he had heart disease and had been treated by a physician for heart disease, but had failed to disclose it in answering questions in the application. It was contended by the insurance company that the evidence shows as a matter of law that he was guilty of fraud. The doctor who treated him ten or twelve times between 1942 and 1944 said: "I am pretty sure I did (tell him he had heart disease) because I admitted him to the hospital on the same day. I am sure I told him he had a heart ailment." He died of cerebral hemorrhage with hypertensive heart disease as a contributing cause. Held that the intent to deceive had not been proven as a matter of law.

> "It is also well settled in this State, that to avoid a policy of insurance because of misrepresentation, the burden is on the insurer to plead and prove, not only that the answers made by the insured were false or untrue, but that the insured knew or should have known that they were untrue and that he made them wilfully with the intention of inducing the insurer to issue him a policy."

Washington National Insurance Co. v. Anderson (Dal. C. C. A.), 94 S. W. 2d 263. Life insurance policy issued August 17, 1933. The insured died October 13, 1933. At the time the policy was issued, he represented by the appli-

cation that he had had no serious disease for the past two years and had not been examined by a physician and was in sound health. A reputable physician testified that in May, 1933, he had examined the insured and found him to be suffering from aneurysm of the aorta superinduced by syphilis in advanced stage. He treated him three times during the next few weeks and after his death made a postmortem examination which confirmed his prior diagnosis. The insured's wife testified that at the time of the issuance of the insurance they had been married for seven years, that the insured had been in good health, and had done manual labor continuously up to the time of his death, that to her knowledge he had never been treated for any disease other than for the flu and that he had always been in good health. Although the evidence was more cogent in favor of the insurance company, still the court held that it was within the province of the jury to find directly contrary to the testimony of the physician and awarded recovery on the policy.

Great Southern Life Insurance Company v. Doyle (Com. App.), 151 S. W. 2d 197. After default in the payment of premiums, the insured applied for reinstatement on December 18, 1935. She died March 4, 1936, from apoplexy. The company was not obligated to reinstate unless it approved her insurability at that time. This approval was granted upon the basis of her application for reinstatement. The following answers were given:

> "2. Have you had any injury, sickness or ailment since this policy was issued—appendectomy April 1935 —O. K.

"3. Have you consulted a physician since this policy was issued—No.

"10. Do you believe you are now in absolutely first-class health—Yes."

Contrary to these answers it appeared conclusively that she had undergone a clinical examination and the doctor who made it testified that he had advised her on March 4, that she had syphilis and should be treated. Her family doctor (another doctor) testified that he treated her for the disease from May to August, 1935, but could not say whether he told her she had the disease. The jury found that she did have syphilis during the time inquired about; that she did not know of it; that her syphilitic condition was material to the risk; that she was not in good health at the time of reinstatement; that she did not know her answer to Question No. 2 was false; that she did not know that she was concealing her condition; that she believed that she was in first class health at the time she made the application; that she did not answer Question No. 10 for the purpose of deceiving the company; that her physical condition at the time was material to the risk. The trial court rendered judgment for defendant withstanding the jury verdict. The Court of Civil Appeals reversed and rendered the judgment in favor of the insured and the Commission of Appeals affirmed the Court of Civil Appeals. The decision was based upon the absence of willful intent to deceive. It is readily seen that her answer that she had not consulted a physician was false and that she was bound to know it was false, and the jury found it was material to the risk. Still the jury was privileged to find that she did

not have the willful intent to deceive. This is in line with Judge Hutcheson's opinion in *Equitable v. Alvarez, 141 Fed. 2d 551.*

GOOD HEALTH—A FACT QUESTION

Vann v. National Life and Accident Insurance Company, Com. of App., 24 S. W. 2d 347. The life insurance company defended on the ground that Mrs. Vann, the insured, was not in sound health at the time the policy was issued, that she was then suffering from a cancer of the uterus. The policy provided that it should not be effective unless the insured was in good health at the time it was issued—May 17, 1926. Her husband testified that she was the mother of six children; that she was treated by Dr. O'Bannon in March, 1926, X-ray treatments; that Dr. O'Bannon told him she had a bad cancer and was likely to die; she left the hospital in April and from then until August 15 she appeared to be in good health so far as he could tell; she did the cooking and her usual work; he took her back to see Dr. O'Bannon who said she was in as good health as anybody.

The thirteen year old daughter testified that her mother did not appear to be sick, and "I did not hear her complain of any sickness or pain during that time."

Dr. O'Bannon said that he examined her March 28, 1926, that she was afflicted with cancer, that he treated her with X-ray and radium and discussed with her the nature of her ailment, and he explained to her the chances that she would die. But said she said she was feeling much better and

that she was going to surprise him by getting well. She was much better after the X-ray and radium treatments, appeared to be getting along satisfactorily. It is possible for cancer to be retarded and for a person to feel well and go about doing her work, that so far as the person herself knew she might have believed she was in ordinary health until the cancer recurred.

Dr. Lundey testified that the extent of the development of the cancer and the time of her death indicated that she must have had the cancer at the time the policy was issued, that she was never free from it from the time it was first discovered.

The jury found that at the time the policy was issued the insured was in good health. The Court of Civil Appeals reversed and rendered but the Supreme Court sustained the jury verdict.

Coxson v. Atlanta Life Ins. Co. (S. Ct.), 179 S. W. 2d 943. Life insurance policy provided that it should not be effective unless the insured was in good health at the time it was issued. The jury found that he was in good health. The Court of Civil Appeals reversed and rendered and the Supreme Court reversed the Court of Civil Appeals and affirmed the trial court. The question was whether the insured had tuberculosis at the time. Policy was issued March 3, 1941, and insured died of tuberculosis July 25, 1942. The insured was admitted to the hospital two months after the issuance of the policy. He signed an application for admission showing that he had been sick for the past two and a half years. The proof of death signed by the

beneficiary and by the doctor showed that he had been ill with tuberculosis since about June 1, 1941.

Other testimony showed that at the time the policy was issued he had an appearance of good health, worked regularly, ate heartily and complained of no ill. Insured's sister testified about his appearance of good health, how he did heavy manual labor and missed only one day's work for a long time.

Held that this testimony raised an issue of fact whether he was in good health at the time the policy was delivered, and that the opinion of experts may be offset by the testimony of lay witnesses on the question of health.

The Fifth Circuit dealt with a Texas case in *American Home Life Insurance Company v. Zuniga, 228 Fed. 2d 403*, a case which reviewed the Texas decisions on the sufficiency of evidence to raise a fact question on health questions. 2-5-53 application for $10,000 life policy. 2-23-53 policy delivered. Contained provisions that the policy should be effective only if delivered during insured's good health. 4-1-53 insured consulted a physician about throat trouble. 4-1-53 biopsy failed to disclose cancer. 8-13-53 operation removed cancer from throat extending down into stomach more cancerous. Death 2-12-54 of cancer of the throat and stomach. Four doctors testified but only one of them said positively that he must have had the cancer at the time of the application but the others were unable to express a definite date that the cancer developed. Lay witnesses testified that he appeared to be in sound health, working regularly without complaint until April 1st, without any

loss of weight until after April 6. The jury found that he was in good health on January 23.

The Court notes:

> "Applicable Texas decisions, particularly the late ones, define tests liberal to the insured to be applied in deciding whether the jury's findings should be disturbed."

Held that the testimony of the lay witnesses in opposition to the testimony of the experts raised a fact question.

The Court quoted from *Coxson v. Atlanta Life Insurance Co., 142 Tex. 544, 179 S. W. 2d 943, 945,* as follows:

> "The opinion testimony of experts, although persuasive, under most circumstances is not conclusive. It is peculiarly within the province of the jury to weigh the opinion evidence, taking into consideration the intelligence, learning and experience of the witnesses and the degree of attention which he gave the matter. The judgment and inferences of experts or skilled witnesses even when uncontroverted, are not necessarily conclusive on the jury or the trier of the facts unless the subject is one for experts or skilled witnesses alone, whether the jury or the court can not properly be assumed to have or to be able to form correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry."

We submit that these cases are different from such cases as *John Hancock Mutual Life Insurance Company v. Esparza, San Antonio C. C. A., 286 S. W. 2d 695 (N. R. E.).* In that case, as a basis for reinstatement of his policy, the insured made representations (1) that he was in sound health, (2) that during the period when the policy had lapsed he suffered from no disease or ailment, and (3) that

he had not consulted or been treated by a physician. As a matter of fact, he had suffered from an incurable bone cancer which had spread to his hands, arms and chest, had made numerous trips to the hospital for deep X-ray and other treatments for cancer on twenty or more occasions. Here there was no question of his ailment, or of his knowledge of his ailment, or of the seriousness of his ailment, and the close proximity of the treatments to the time of the reinstatement of the policy. The jury finding was set aside and judgment was entered by the court denying recovery.

Texas Prudential Insurance Company v. Dillard (Tex. S. Ct.), 307 S. W. 2d 242, is likewise different from the cases cited and from the case at Bar. It was shown without doubt that prior to the issuance of the life insurance policy (which contained a good health clause) that the insured suffered from the worst form of epilepsy; that all during the period prior to the issuance of the policy and thereafter, he took medicine designed to suppress the symptoms but not to cure the disease. He sustained seizures once a year or at more frequent intervals whenever he discontinued the medicine. The Court notes that "There is no doubt that at the time the policy was issued the insured was afflicted with a disease that produced, and had been producing, the same sort of seizures or convulsions from which he died some nine months later." As opposed to this uncontradicted testimony, there was proof by lay witnesses that the insured appeared to be in good health and led an active life. The jury found against the insurance company

and the court reversed and rendered the decision. In reaching this result, the Court referred to and distinguished *Sovereign Camp v. Derrick, Tex. C. A., 64 S. W. 2d 982*, a cancer case, supra; *Coxson v. Altanta Life Insurance Company, 142 Tex. 544, 179 S. W. 2d 943*, supra; *Vann v. National Life and Accident Insurance Company, Tex. C. A., 24 S. W. 2d 347; American Home Life Insurance Company v. Zuniga, 5th Cir. Tex., 228 Fed. 2d 403*, on the ground that in each of those cases there was evidence indicating doubt as to whether the insured was afflicted with disease at the time the policy was issued, whereas, in the *Dillard* case there was no such doubt. This is exactly the distinction which exists in the case at Bar. There is serious doubt in the evidence whether Harold Roosth was afflicted with essential hypertension at the time he applied for the policy; the testimony is in conflict.

In the *Dillard* case Justices Calvert, Smith and Walker dissented with a strong opinion, expressing the belief that epilepsy should not be included with the few diseases recognized as a matter of law to disprove substantial good health. Essential hypertension has never been recognized in Texas as such a disease. The reason is that a person may admittedly have certain diseases and still be in the relative substantial good health required by the policy if the court or jury so finds as a fact question. The only diseases where it is unquestionably established that the insured had the disease at the time the policy was issued which the Texas Courts have held as a matter of law defeat "good

health" are, tuberculosis, *American National Insurance Co. v. Lawson, 133 Tex. 146;* cancer, *Morris v. Tatum, 152 S. W. 2d 871, no writ of error history;* paresis, *Phipps v. American National Insurance Co., 116 S. W. 2d 800, writ dism.;* pelvic cellutis, *Hughes v. American National Insurance Co., 146 S. W. 2d 470, no writ of error history,* and now epilepsy.

The excellent reason why essential hypertension should not be added to that list is that little is known about it, doctors disagree when a patient has it and what is a proper treatment, and what is its effect. In our case the doctors even disagree what caused the subarachnoid hemorrhage. Such a nebulous condition can hardly be so clear that reasonable minds may not differ. Not even the terminology is clear.

CONCLUSION

The only thing this case involves is an argument of facts, whether the evidence is conclusive or controversial on certain issues. Petitioner has not squarely presented the controversy, it assumes the facts to be in its favor rather than present both sides. Instead it has set up a "straw man" to knock it over, the supposed injustice of failure by the Circuit Court to recognize the authority of the Trial Court to take the case from the jury. They say it is a case of great importance to the insurance industry where actually it is authority for nothing except under its peculiar facts.

We respectfully submit that the Petition for Writ of Error should be denied.

CHAS. F. POTTER
Of SPRUIELL, LOWRY, POTTER,
LASATER & GUINN,
Fourth Floor Peoples Bank
Building,
Tyler, Texas,
Attorney for Respondent.

A copy of the foregoing Respondent's Brief has been delivered to Thos. B. Ramey, Citizens First National Bank Building, Tyler, Texas, Attorney for Petitioner, this 14 day of November, 1959.

CHAS. F. POTTER,